(33,800)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 491

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., APPELLANT,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, SARAH JANE BROOKE AND JOHN ARTHUR BROOKE

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

	Original	Print
Record from district court of appeal of California	1	1
Petition for writ of review	1	1
Exhibit "A"—Application for adjustment of claim (omitted in printing)	10	
Exhibit "B"—Order of I. A. C. joining London Guarantee Co. as party defendant	12	8
Exhibit "C"—Answer of defendants before I. A. C. (omitted in printing)	13	
Exhibit "D"—Findings and award (omitted in printing)	15	
Exhibit "E"—Petition for rehearing (omitted in printing)	17	
Exhibit "F"—Order denying rehearing (omitted in printing)	23	
Memorandum of points and authorities in support of petition for writ of review (omitted in printing)	24	

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	Original	Print
Order granting writ of review	31	8
Writ of review	32	9
Proceedings before Industrial Accident Commission	33	10
Secretary's certificate	33	10
Application for adjustment of claim	34	10
Answer	36	12
Report of hearing	38	14
Stipulation re evidence, etc	39	15
Issues	40	16
Testimony of Sarah Jane Brooke	42	17
John Arthur Brooke	52	25
Clifford A. Morris	54	27
Sarah Jane Brooke (recalled)	59	31
Secretary's certificate	60	32
Report of hearing, case of Gregory et al. vs. Morris Pleasure Fishing, Inc	61	32
Stipulation as to facts	62	33
Issues	62	34
Testimony of Jennie Gregory	64	34
Josephine Morris	69	38
Clifford A. Morris	74	42
John T. Dugan	79	46
Findings and award	83	49
Petition for rehearing	85	51
Order denying rehearing	91	55
Proceedings in supreme court of California	92	56
Petition for hearing	92	56
Exhibit—Opinion, Johnson, J., district court of appeal	125	80
Order allowing petition for hearing	143	104
Order setting cause	144	104
Citation of additional authorities (omitted in printing)	145	
Reply brief of London Guarantee Co. (omitted in printing)	146	
Order of submission	150	105
Judgment	151	105
Opinion, Langdon, J	152	106
Petition for rehearing (omitted in printing)	157	
Answer to petition for rehearing (omitted in printing)	168	
Order denying rehearing	171	109
Judgment	172	110
Petition for appeal, etc	173	110
Order allowing appeal	177	114
Bond on appeal (omitted in printing)	178	
Citation and service (" " ")	181	
Writ of error (" " ")	182	
Stipulation re transcript of record	184	114
Clerk's certificate (omitted in printing)	188	
Order extending time	194	120
Statement of points to be relied upon and designation of parts of record to be printed	208	120

[fol. 1]

IN DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION TWO

No. 5532

London Guarantee and Accident Company, Ltd., Petitioner,

vs.

The Industrial Accident Commission of the State of California, Sarah Jane Brooke, and John Arthur Brooke, Respondents

Petition for Writ of Review

To the Honorable Presiding Justice and to the Associate Justices of the District Court of Appeal of the State of California, Second Appellate District:

Petitioner herein respectfully petitions the above entitled court for a writ of review and alleges the following facts:

I

Petitioner, London Guarantee and Accident Company, Ltd., is now and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of England, and authorized to do and doing a general insurance business in the United States of America and the State of California, with a branch office in the City of Los Angeles, State of California.

II

Petitioner at all times herein mentioned has been and now is the insurance carrier of the Morris Pleasure Fishing, Inc., a corporation.

III

That on the 8th day of April, 1926, John James Uttley [fol. 2] Brooke, an employee of Morris Pleasure Fishing, Inc., was drowned in the navigable waters of the Pacific

Ocean and thereafter on the 24th day of April, 1926, Sarah Jane Brooke and John Arthur Brooke duly and regularly filed with the respondent, Industrial Accident Commission of the State of California, their application for adjustment of claim for dependency against Morris Pleasure Fishing, Inc., on account of said death. That a copy of said application is hereto attached marked Exhibit "A," and made a part of this petition.

IV

That thereafter and on or about the 28th day of May, 1926, an order joining petitioner, London Guarantee and Accident Company, Ltd., as a party defendant in this proceeding, was made by respondent, Industrial Accident Commission of the State of California. That a copy of said order is hereto attached, marked Exhibit "B," and made a part of this petition.

V

That on or about the 2nd day of June, 1926, an answer to said application was filed by petitioner, London Guarantee and Accident Company, Ltd., for and on behalf of itself and Morris Pleasure Fishing, Inc., a copy of which answer is hereto attached, marked Exhibit "C," and made a part of this petition.

VI

That thereafter and on the 10th day of June, 1926, and the 13th day of September, 1926, hearings were held before the respondent, Industrial Accident Commission of the State of California; that thereafter, and on or about the 6th day of October, 1926, respondent Commission made and rendered in writing its findings and award, a copy of which is hereto attached, marked Exhibit "D," and made a part of this petition.

VII

That therein and thereby the said respondent Commission [fol. 3] found that Brooke while employed as a spare skipper sustained injury occurring in the course of and arising out of his employment, and that the injury was the proximate cause of his death; that at the time of his death he was not engaged in maritime employment. That respond-

ent Commission further found that his parents, Sarah Jane Brooke and John Arthur Brooke, were not wholly or partially dependent upon him for support; that the reasonable burial expense was in the sum of $150.00, and that an award should be and was made in this amount with interest at the rate of seven per cent. per annum until paid.

VIII

That thereafter petitioner, London Guarantee and Accident Company, Ltd., applied for a rehearing by said Commission, and on or about the 5th day of November, 1926, said respondent Commission, by its order in writing, denied petitioner's application for rehearing. That a copy of said petition for rehearing is hereto attached, marked Exhibit "E," and made a part of this petition. That a copy of said order denying petition for rehearing is hereto attached, marked Exhibit "F," and made a part of this petition.

IX

That the facts in the matter in question as shown by the evidence introduced at the hearings before the respondent, Industrial Accident Commission of the State of California, are as follows:

That the Morris Pleasure Fishing, Inc., a corporation, was incorporated for the sole purpose of operating and maintaining fishing vessels at the fishing banks of the Pacific Ocean, to be used by the public for deep sea fishing; that in conjunction therewith, said Morris Pleasure Fishing, Inc., operated and maintained several vessels ranging from four to fourteen tons registry, equipped with gas engines and capable of cruising a distance of five hundred miles, to carry and transport for hire, back and forth over the navigable waters of the Pacific Ocean, from the Santa [fol. 4] Monica Pier, Santa Monica, California, to their fishing vessels which navigated in and about the fishing banks several miles out in the Pacific Ocean, any and all persons desirous of deep sea fishing; that the vessel "W. K.," a seven ton registered vessel, equipped with a gas engine, was one of the fishing vessels which was at all times herein mentioned navigated under its own power in and about the fishing banks; that a charge of One Dollar

($1.00) was made to all persons desiring to make the morning deep sea fishing trip, and a charge of One Dollar and Fifty Cents ($1.50) was made to all persons desiring to make both the morning and afternoon deep sea fishing trips; that for these charges the public was entitled to fish from the fishing vessels such as the vessel "W. K."; to be transported to and from said fishing vessels, as aforesaid; and to be supplied with bait; that said Morris Pleasure Fishing, Inc., did not engage in any land enterprise or business, but on the contrary engaged solely in the maritime business aforesaid; that to carry out this maritime occupation or business, said Morris Pleasure Fishing, Inc., employed seamen to navigate their various vessels over the navigable waters of the Pacific Ocean; that John Brooke, the deceased, was employed by said company for the purpose of aiding in the navigation of these vessels back and forth, to and from the fishing vessels, which were navigated in and about the fishing banks several miles from shore; that said Brooke was an apprentice navigator and seaman; that he was employed to make trips daily to and from the fishing vessels located as aforesaid, over the navigable waters of the Pacific Ocean; that these duties constituted his contract of employment with the Morris Pleasure Fishing, Inc.; that at times Brooke would substitute as a "spare skipper" for one of the skippers and navigate one of the vessels on its trips to and from the fishing vessels navigating in and about the fishing banks as aforesaid; that on or about the 8th day [fol. 5] of April, 1926, the sea was running very high, with a severe storm raging; that while the vessel "W. K." was at anchor at one of the fishing banks, a distance of about one mile from said pier, the heavy sea broke the vessel "W. K." loose from its moorings and started it adrift in the direction of the Santa Monica Pier; that upon noticing that the "W. K." was adrift, the deceased, John James Uttley Brooke, and two other employees of Morris Pleasure Fishing, Inc. to-wit: Captain Thornton Morris and Leland Gregory, who were standing on the Santa Monica Pier, near the anchorage of the other vessels of that company, boarded one of said vessels, and put out to sea to rescue the "W. K." and navigate her to a safe anchorage; that after they had navigated to within a short distance of the "W. K.," a large comber or swell struck and capsized their vessel, throwing

them into the sea where all three men were drowned; that two more employees of the Morris Pleasure Fishing Inc., by the names of Duggan and Terresi, upon seeing the aforesaid vessel capsize and the three occupants thrown into the sea, started out in another vessel with life preservers, in an effort to save Morris, Brooke and Gregory; that due to their own vessel overturning and upsetting, they, Duggan and Terresi, were forced to swim back, with the aid of the life preservers, to save their own lives.

To sum up, the evidence introduced at the hearings showed that the Morris Pleasure Fishing, Inc., was engaged exclusively in maritime industry; the contract of Brooke called strictly for maritime labor. His entire employment consisted of a seaman's duties, and the place where the injury occurred was on navigable waters. He had no duties to perform on land.

X

That respondent, Industrial Accident Commission of the State of California acted without and in excess of its powers, in that in and by its decision herein rendered it [fol. 6] found that at the time of the alleged injury suffered by John James Uttley Brooke, he was working and engaged in non-maritime employment and that said Commission therefore had jurisdiction in this proceeding, while the evidence conclusively showed that petitioner was on navigable waters, under a maritime contract and engaged in maritime employment.

XI

That the decision and order of the respondent Commission herein was unreasonable in that:

1. Said Commission did not have jurisdiction in this proceeding;

2. That at the time of said injury, John James Uttley Brooke was working on navigable waters;

3. That at the time of said injury said Brooke was engaged in maritime employment.

4. That the subject matter of said Brooke's contract of employment was maritime;

5. That the nature and character of the work to be performed by Brooke under said contract was maritime;

6. That the injury received by Brooke was maritime;

7. The order and decision are not supported by the evidence.

XII

That the findings of fact made by respondent Commission do not support said order or decision in that:

1. Brooke's contract of employment was maritime;

2. His injury was maritime;

3. The subject matter of his contract of employment was maritime; and

4. The nature and character of the work to be done by him was maritime.

[fol. 7]

XIII

That no appeal lies from said order or decision of said Commission and your petitioner has no other plain, speedy or adequate or other remedy for the said unlawful and unreasonable action and decision of the respondent Commission in the premises, except the granting of a writ of review by this Honorable Court, and your petitioner does respectfully represent that it is just and proper and necessary to protect the interests of petitioner herein that a writ of review issue out of this court requiring the said respondent Commission to certify to this court that said order and decision, together with the record in the case, all the evidence introduced upon the hearings before said respondent Commission together with each and all of the records, papers, and files in said case and petitioner prays that this court thereupon review the said order and decision of the said respondent Commission and vacate, annul and set aside the said order and decision and that it be ordered, adjudged and decreed whether said despondent Commission has jurisdiction of this proceeding, and that the said Commission be ordered and directed to make its findings and award accordingly.

XIV

That this petition for writ of review is made to this Honorable Court for the reason that under the terms and provisions of the Workmen's Compensation, Insurance and Safety Act of the State of California, any party affected by the denial by the Industrial Accident Commission of an application for rehearing may apply to the Supreme Court of this State, or to the District Court of Appeal of the State of California, in the Appellate District in which such person resides, for a writ of certiorari, or review, for the purpose of having the lawfulness of the said order or decision on rehearing inquired into and determined. That your petitioner is a corporation of England, licensed to do and doing business in the State of California, with a branch [fol. 8] office in the Second Appellate District of the District Court of Appeal of the State of California.

Wherefore your petitioner makes application to this Court to grant your petitioner a writ of review requiring the said respondent Commission to certify fully to this court at a specified time and place, a transcript of the record and proceedings of said Commission to the end that said order be reviewed by this court and that upon review thereof such order be annulled and adjudged void and of no effect, and that it be ordered, adjudged and decreed that respondent Commission has not jurisdiction of this proceeding, and that it makes its decision accordingly.

W. E. Albright, Petitioner. E. R. Young, H. R. Kelly, and E. L. Williams, Attorneys for Petitioners.

[fols. 9-11] *Duly sworn to by W. E. Albright. Jurat omitted in printing.*

[fols. 12-30] EXHIBIT "B" TO PETITION

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

Claim No. L. A. 6044

SARAH JANE BROOKE, JOHN ARTHUR BROOKE, Applicant-,

vs.

CAPTAIN MORRIS FISHING CO. and LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, Defendant-

Order Joining Parties Defendant

Good cause appearing therefore,

It is ordered that London Guarantee and Accident Company, Limited, be joined as a party defendant in the above-entitled cause.

Industrial Accident Commission of the State of California. John W. Carrigan, Commissioner.

Dated at Los Angeles, California, May 28, 1926.

Attest: G. M. Laird, Assistant Secretary.

Copies mailed to —— ——.

[fol. 31] IN DISTRICT COURT OF APPEAL OF CALIFORNIA

ORDER GRANTING WRIT OF REVIEW

By the COURT:

Petition for writ of review granted, returnable before this court Monday January 31, 1927.

Dated Jan. 7, 1927.

Works, P. J.

[fol. 32] In District Court of Appeal of California

[Title omitted]

Writ of Review—Filed Jan. 10, 1927

The People of the State of California to the Industrial Accident Commission of the State of California, Greeting:

Whereas, It has been made manifest to our District Court of Appeal by the affidavit of W. E. Albright, Claim Manager of Southern California Claim Department of London Guarantee and Accident Company, Ltd., the party beneficially interested, that in a certain action pending before you, against Morris Pleasure Fishing, Inc., and London Guarantee and Accident Company, Ltd., at the suit of Sarah Jane Brooke and John Arthur Brooke you, exercising judicial functions, have exceeded your jurisdiction, and that there is no appeal nor any other plain, speedy, and adequate remedy, and being therefore willing to be certified of the said action or proceedings,

We therefore command you, That you certify and send to our District Court of Appeal of the State of California, Division Two, at Los Angeles, for hearing Monday, January, 31, 1927, at 10 o'clock A. M. annexed to the writ a transcript of the record and proceeding in the action aforesaid, with all things touching the same as fully and entirely as it remains before you, by whatsoever names the parties may be called therein, that the same may be reviewed by our said District Court of Appeal, and that our said District Court of Appeal may further cause to be done thereupon what it may appear of right ought to be done.

Witness the Hon. Lewis R. Works, Presiding Justice of our District Court of Appeal, Division Two, at the Court Room in the City of Los Angeles, this 8th day of January, A. D. 1927.

H. C. Lillie, Clerk. M. C. Van Allen, Deputy Clerk.

[File endorsement omitted.]

[fol. 33] BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

L. A. Claim No. 6044

SARAH JANE BROOKE and JOHN ARTHUR BROOKE, Applicants,

vs.

MORRIS PLEASURE FISHING, INC., and LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, Defendants

SECRETARY'S CERTIFICATE

I, F. B. Lord, Secretary of the Industrial Accident Commission, hereby certify that the attached is a full, true and correct copy of the record of proceedings had before the Industrial Accident Commission in the above entitled cause.

Attest my hand and the seal of the Industrial Accident Commission of the State of California.

F. B. Lord, Secretary. (Seal.)

Dated at San Francisco, California, this 26th day of January, 1927.

[fol. 34] BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF CALIFORNIA

San Francisco Office: State Building, Civic Center. Los Angeles Office: Sun Finance Building

Claim No. L. A. 6044

SARAH JANE BROOKE, (Address:) 1621 Ocean Front, Santa Monica, JOHN ARTHUR BROOKE, Applicant,

vs.

CAPTAIN MORRIS FISHING CO., Defendant, (Address:) Santa Monica Pier, L. A.

APPLICATION FOR ADJUSTMENT OF CLAIM—Filed Apr. 24, 1926

1. On (Date of injury:) April 8th, 1926, (Name of employee:) John James Uttley Brookes, while employed as a (Occupation at time of injury:) spare skipper at (City, town or place where injury occurred:) Santa Monica Pier,

California, by (Name of employer:) Captain Morris and Company, sustained injury arising out of and in the course of the employment; said injury being received in the following manner (Explain how injury was received): Drowned.

2. The parts of the body injured and subsequent results are: ——.

3. Employer's insurance carrier was (Name and address of insurance company:) —— ——.

4. Injured left work on (Date disability began:) —— ——, 192-, and disability continued to —— ——, 192-.

5. Last payment of indemnity on —— ——, 192-, last medical — furnished by employer on —— ——, 192-.

6. Medical or surgical treatment has been rendered by (Give name and address of all doctors who treated or examined and state whether furnished by employer or insurance carrier:) —— ——.

7. Age of employee was 19 years and the wage $140.00 per (Day, week or month:) month, working seven days per week. (If board, lodging, or other advantages were furnished by the employer and without charge, state what and market value of each:) ——.

To be Used in Death Cases Only

8. It is claimed that the deceased left the following named dependent: Name, Sarah Jane Brooke; age, 48 years; relationship, Mother; address, 1621 Ocean Front.

[fol. 35] 9. A question has arisen with respect to the liability of the employer or insurance carrier, and the general nature of the claim in controversy is: ——.

Wherefore it is requested that a time and place be fixed for hearing and notice given, and that an order or award be made granting such relief as the party or parties may be entitled to.

(Signature of applicant or applicants:) Sarah Jane Brooke, John Arthur Brooke. (Agent or attorney for applicant:) Monte Cly, (Address:) 6810 West Blvd.

Dated at Los Angeles this 24th day of April, 1926.

NOTE.—Under the provisions of the Workmen's Compensation, Insurance and Safety Laws, the Applicant need only state the general nature of the claim in controversy. When Application has been filled out and signed by Applicant it must be filed with or mailed to the nearest office of the Industrial Accident Commission without delay. Due notice will thereafter be given of the time and place of hearing. Either party may be represented in person, by attorney or other agent.

[fol. 36] [File endorsement omitted]

BEFORE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

L. A. Claim #6044

[Title omitted]

ANSWER—Filed June 2, 1926

Now comes the defendants, Morris Pleasure Fishing Inc., and the London Guarantee and Accident Co. Ltd., a corporation, Insurance Carrier, admit, allege and deny.

I

That at all times mentioned the London Guarantee and Accident Company Ltd. was Insurance Carrier for the Morris Pleasure Fishing Inc., and as such assumed the obligations of the California Workmen's Compensation, Insurance and Safety Act and its amendments, which might be imposed against the Morris Pleasure Fishing Inc., in the premises, notice of which has duly been given the attorney for the applicant, a copy of which is attached hereto marked "Exhibit A" herein specifically referred to and made a part thereof.

II

Said defendant, London Guarantee & Accident Co. Ltd., denies being the insurance carrier for Captain Morris Fishing Co.

III

Said defendants admit that upon April 8th, 1926, Jack Brooks was in the employ of Morris Pleasure Fishing Inc.

IV

Said defendants deny that the death of Jack Brooks arose through an accident arising out of and in the course of his employment with the said defendant which was subject to the terms and provisions of the California Workmen's Compensation Insurance and Safety Act and its amendments.

[fol. 37]

V

Said defendants allege that at the time of death, Jack Brooks, the decedent, was engaged in maritime employment and was subject to the terms and provisions of the Maritime Act or Admiralty Law and not the California Workmen's Compensation Insurance and Safety Act and its amendments.

VI

The said defendants allege that the Industrial Accident Commission of the State of California has no jurisdiction in this matter by reason of the maritime employment.

VII

Said defendants deny any and all liability in this matter under the California Workmen's Compensation Insurance and Safety Act and its amendments.

VIII

Wherefore the said defendants, the Morris Pleasure Fishing Inc., and the London Guarantee & Accident Co. Ltd., a corporation, insurance carrier, pray that the said applicants take nothing from the defendants and that the application for compensation benefits be dismissed.

W. E. Albright, for Defendants, Morris Pleasure Fishing, Inc., and London Guarantee & Accident Co., Ltd., a Corporation.

[fol. 38] BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

L. A. Claim No. 6044

[Title omitted]

Report of Hearing—Filed July 7, 1926

This cause came on regularly for hearing on the 10th day of June, 1926, at 10:30 o'clock A. M., at the Chamber of Commerce Building, Long Beach, California, before Letus N. Crowell, Referee.

The applicants were neither present nor represented.

The defendants were represented by W. E. Albright, Esq., 510 H. W. Hellman Building, Los Angeles, California.

An answer was filed by defendants.

R. M. Marshall, reporter.

Case continued for further hearing to be set at Los Angeles, California, at the same time that the hearing is set for the Gregory vs. Morris, et al., L. A. #5988.

[File endorsement omitted.]

[fol. 39] BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

L. A. Claim No. 6044

[Title omitted]

Report of Further Hearing—Filed Sept. 17, 1926

This cause came on regularly for hearing on September 13, 1926, at 3:30 o'clock P. M., at 911 Sun Finance Building, Los Angeles, California, before Letus N. Crowell, Referee.

Present:

Applicants Sarah Jane Brooke and John Arthur Brooke present in person; address, 1673 Ocean Avenue, Santa Monica California. Applicants represented by Attorney Robert E. Shippey, 409 Hibernian Building, Los Angeles, Cali-

fornia. (Entering late for Gregory case, during testimony of its first witness.)

Defendants represented by W. E. Albright, Adjuster, 510 H. W. Hellman Building, Los Angeles, California.

Mary Beck, Reporter.

STIPULATION RE EVIDENCE, ETC.

Whereupon the following proceedings were had, to-wit:

Referee: Stipulated and agreed by and between the parties hereto that the testimony in the case entitled Mrs. Jennie Gregory et al. vs. Captain Morris Fishing Co. and London Guarantee & Accident Company, L. A. No. 5986, given by witness Mr. Morris, and witness Mr. Dugan, may be considered as evidence and testimony in the above entitled case. It is hereby further stipulated that:

[fol. 40] Stipulations

1. That John James Uttley Brooke, hereinafter called the employee, was, on the 8th day of April, 1926, at Santa Monica, California, in the employment of defendant Morris Pleasure Fishing, Inc., hereinafter called the employer, as a spare skipper, and at said time the employee's age was 19 years.

2. That at said time the Defendant London Guarantee & Accident Company, Ltd., was the insurance carrier for the employer and is liable for the normal compensation if any which the employer is liable to pay.

3. That no medical treatment was rendered.

4. That the employer had notice and knowledge of the assertion of claim of injury and death as defined by Section 15 of the Workmen's Compensation, Insurance and Safety Act of 1917 and the Amendments thereto.

5. That at said time the actual monthly earnings of the employee were $140.00, and that the average weekly earnings may be computed upon that basis. (See order and additional issue, Page 3.)

6. That no death benefit has been paid.

7. That $150.00 on the burial expense of the employee has been incurred with the Undertaker Mendenhall, whose address is 4th Street, Santa Monica, California, and the same has not been paid.

Issues

The issues in this case are:

1. Has this Commission jurisdiction in this proceeding, to-wit, was the employment maritime?

2. Was the employee injured?

3. If the employee was injured, did said injury arise out of and in the course of said employment, was it proximately caused thereby, and did it occur while the employee was performing service growing out of and incidental to the same?

[fol. 41] 4. Was said death proximately caused by any injury or injuries arising out of the employment?

5. Dependency.

6. (See order on Page 3.) What were wages of employe at time of injury?

Referee: Good cause appearing therefor:

It is ordered that the name appearing as Captain Morris Fishing Company be and the same is hereby amended to read "Morris Pleasure Fishing, Inc."

Witnesses:

Mrs. Sarah Jane Brooke, Applicant.
John Arthur Brooke, Applicant.
Captain Clifford A. Morris, by Def.
Recalled, Mrs. Sarah Jane Brooke, by Def.
John T. Dugan, by Def.
(And see Order re witnesses in Gregory case, to be considered here.)

It is ordered that the stipulation in regard to the earnings of the employee at the time of said injury be cancelled and stricken from the record, and an additional issue made as to what the wages of the employee were at the time of the injury.

(Reporter's Note.—So changed at this time.)

Case submitted.

[fol. 42] L. A. No. 6044

Sarah Jane Brooke & John Arthur Brooke

vs.

London Guarantee & Accident Company, Ltd.

Transcript of Testimony

Sworn as witness and testifying as follows: Mrs. Sarah Jane Brooke, applicant, 1673 Ocean Avenue, Santa Monica, California:

Examination by Referee:

Q. What relation, if any, did you bear to John James Uttley Brooke?

A. My son.

Q. On April 8, 1926?

A. He was my son, and I am his mother.

Q. Is your husband living?

A. Yes, he is my second husband.

Q. Is your second husband living?

A. Yes, Mr. Brooke is my second husband; Mr. Okew, O-K-E-W, was my former husband before he died. He was the father of my boy, the former husband.

Q. Were you and your husband living together on April 8, 1926?

A. Yes.

Q. What is your second husband's business?

A. We have been in the apartment house business.

Q. Examine, Mr. Shippey.

Examination by Attorney Shippey:

Q. What were the earnings of your son from his connection with the Morris Pleasure Fishing Company, Incorporated?

A. When he started to work for the fishing company at first, he started at $80.00 a month and from then on he kept getting a little bit more, and promise of a little bit more, and Captain Morris told him on the pier, in February, that he had planned that Paul, as they called him down on the wharf, $140.00 or $130.00. He was going to give him [fol. 43] a license to run a boat of his own, said he was going to give him a license, and he told him he was sorry that things were so bad in the winter he couldn't pay them the full money, but just enough to get by for the winter, but that when spring came, he would make up their full wages.

Q. Were you dependent on the wages of your son for support, from the earnings with the fishing company?

A. In several ways. Mr. Brooke wasn't working, and when we gave up our apartment house business we had lost our apartment house through the slow times in Los Angeles, and we were looking to Jack for a living.

Q. When did you lose your apartment house?

A. July, 1925, practically lost it, didn't completely lose it.

Q. What proportion of his earnings was your son giving to you?

A. Whatever he could give me, sometimes he would give me $5.00, sometimes he would give me $10.00, because if he didn't give it I would say "Can't you give me more?" and he said "No, Captain doesn't want to give us anything unless it is by check, and I don't like to ask him unless it is coming payday."

Q. Was your son receiving a stated salary every week or month?

A. No, there is no particular time on salaries.

Q. Did he get any particular salary during the winter?

A. No, he didn't get any particular salary, only the one time he got $30.00 for three months, a check for $30.00.

Q. As I understand it, and from what you understood from Captain Morris from your son, any money over the amount he did get was to be paid to him in the spring?

[fol. 44] A. Absolutely.

Q. In other words, the amount of money he didn't receive, over and above the amount he did receive, was to accrue to him and be paid when business improved?

A. Yes, those were Captain Morris' own words.

Q. Did you see your son April 8th?

A. Yes.

Q. About what time of the day did you see him?

A. About half an hour before they brought in the news he was drowned.

Q. What time was that?

A. Between twelve-thirty and one-thirty; I wouldn't want to say exact.

Q. In the afternoon?

A. No, just about noontime.

Q. Had he gone to work that morning?

A. Yes.

Q. And he came home for his lunch?

A. No, he didn't come home to lunch that day at all. We were in the stand on the Front, 1621 Ocean Front, in the concession at the time, I give the address on that paper, and Cummings came in and said "Mother, I want a package of cigarettes," and when I said "That breeze is rough this morning," he left me and I never saw him again.

Q. Where did he go after he left your place?

A. Right out on the pier. I watched as far as I could see him.

Q. Was it his intention when he left you to go back to his work?

A. He was on the pier with that intention, no doubt.

[fol. 45] Q. How much of his time was he devoting to the Morris Pleasure Fishing Company?

A. How many hours a day?

Q. No, did he work every day for the company?

A. Yes, he didn't lost any time at all.

Q. He was not employed by anyone else?

A. No, sir.

Q. Was his body recovered?

A. Three or four days after, Sunday morning.

Q. I guess that is all.

Referee: Examine, Mr. Albright.

Examination by Mr. Albright:

Q. Where did you live on April 8th?

A. In Ocean Front, Santa Monica, 1621 Ocean Front.

Q. Where did Jack, or Paul, live at that time?

A. He was staying with Mrs. Hudling at that time.

Q. What is her address?

A. It is on Fairfax Avenue, but I couldn't give the number by heart. I think they call it the Gilmore Ranch.

Q. He didn't live at your house then?

A. Not at that time before the accident. Before we took that little place on Ocean Front we were living in Los Angeles, and it was too far for Paul to come to Los Angeles every night, because he had to get there for the four o'clock boat, or whatever time they go out, but Chet (this boy that runs one of the boats) him and Chet were pals, and they asked him to stay with them. He was staying—practically coming home, and there. He had some of his meals with them and slept with them, and sometimes he came home and had his meals and slept with us.

[fol. 46] Q. When did you move to Santa Monica?

A. April 19, 1925. We took that stand at that time.

Q. How did you know he received $140.00 a month?

A. That he didn't receive it? How do I know that he didn't receive it?

Q. You testified he received $140.00 a month.

A. No, I said Captain said he was going to pay him from a hundred and forty to a hundred and fifty—that he started at eighty dollars a month, but that he was going to give him that amount.

Q. What was your understanding as to his wage at the time he was drowned?

A. I figured just like I say now, the Captain or whoever would be left would look after the thing.

Q. Just answer, what amount did you understand he was earning when he was drowned?

A. One hundred dollars a month. He climbed from eighty to a hundred dollars, and the Captain had told him he was going to give him from one hundred and forty to a hundred and fifty.

Q. Did you have concession on Santa Monica Pier or in Santa Monica?

A. Right on the ocean there, 1621.

Q. What kind of concession was that?

A. A hot-dog stand, just a little stand.

Q. Where you in that business alone, or was——

A. Mr. Brooke was with me.

Q. What was the approximate income from that business?

A. Well, on the average, sometimes it would earn $7.00 a day, sometimes $10.00—not much more than that. We would have a good day when we had that.

Q. While you had this concession stand you also ran an apartment house?

[fol. 47] A. No, we gave up our apartment house a year ago last July, 1925.

Q. And the only business you and Mr. Brooke were engaged in at that time was this concession?

A. Yes.

Q. How often did Paul, or John Brooke, give you any money?

A. Not very often, because he hadn't got it. I had to pay his doctor bill. I had to pay his little clubs and lodges he had, because he couldn't get his money to pay it with, and I understand that when he was drowned, that Mrs. Hudling came to me and asked about the bill that he owed her, and she said that she knew that Paul hadn't gotten his money, or he would have paid her, because he owed her $77.00 when he was drowned, and the boys on the pier made up a collection and paid his bill because he hadn't gotten his money.

Q. How much did he give you in the year preceding his death?

A. Altogether?

Q. Yes.

A. I haven't kept track, sometimes $10.00, sometimes $5.00, sometimes $15.00, and a year ago he gave me $15.00. It just happened to be on my birthday, and he gave me $15.00 then. It was all he could get.

Q. He gave you $15.00 on your birthday?

A. Yes, that was a year ago this August. That was the highest I have ever had from him all at once.

Q. When did he next give you any money?

A. I don't just remember the time, I came down on the pier one day and I asked him if he had any, and he said he hadn't, but he said "Here is one dollar, Mother, if that will help you out some."

Q. When was that?

A. Maybe it would be a month or six weeks after that. [fol. 48] I don't know just when, but I have had awful little from him the last six months previous to his death.

Q. How much would you say you received from him?

A. Perhaps fifty dollars.

Q. You feel that the Morris Pleasure Fishing, Incorporated, owe him, or you, any back salary?

A. I certainly do, and I don't think I am the only one that feels that way.

Q. You understand that his salary was $80.00 a month when he was drowned?

A. I was absolutely sure from when he started on the boat.

(Interruption by Attorney Shippey:) The question was "You understand that his salary was $80.00 a month when he was drowned."

A. No, when he started. $100.00 was what he got when he was drowned, but the Captain promised him one hundred and forty, one hundred and fifty when he got on his boat, and he had the license in his pocket when he went and was drowned.

Q. $80.00 a month?

A. $100.00 a month when he was drowned.

Q. You believe as to back salary—did you bring this question of back salary before the Labor Commission?

Attorney Shippey: I don't see where that is material here.

Referee: Neither do I.

Mr. Albright: That is all.

Examination by Attorney Shippey:

Q. Was your son married?

[fol. 49] A. No.

Q. Was he supporting any person other than yourself?

A. No.

Q. This seven dollars, ten dollars, a day, that you say you made by this concession, was that net, or gross?

A. That was net, of course.

Q. You would make $7.00, and $10.00, after all the bills were paid?

A. Well, of course, on top of—we had the rent to pay out of that, but that is the amount taken one day with another, the whole stand—I was behind with my rent, at the time he was drowned.

Q. How much rent did you pay there?

A. Fifty dollars a month. I was behind when Jack was drowned.

Q. I think that is all. Anything further?

The Referee:

Q. You say you paid some of the bills of your son?

A. Yes, his doctor bill, $20.00.

Examination by Referee:

Q. When did you pay that?

A. Some time in December, was it, to Doctor—Captain Morris took him to the doctor at the time he broke his arm.

Man in the hearing-room named Dugan, answers: Dr. Darchern.

Q. What other amounts did you pay on behalf of your son?

A. I was paying his lodge dues, couldn't keep them going.

Q. How much did the lodge dues come to?

A. $5.00 a month.

Q. What other amounts did you pay on his behalf?

A. As far as buying—I tried to do what I could to help [fol. 50] him get some clothes, terrible, to keep him respectable on the pier.

Q. Did you buy clothes for him?

A. I certainly did, because he didn't seem to have anything to buy anything with, and I knew he wasn't spending it, because he didn't go out anywhere to spend it.

Q. When did you buy him anything?

A. In March I bought him socks and handkerchiefs.

Q. How much did they cost?

A. It all depends on the kind I was getting, fifty cents a pair for his socks, handkerchiefs.

Q. Just prior to April 8th, 1926, how much did you pay a month, do you think, on behalf of your son, taking everything?

A. I figured like this—that really, the money that I paid and the money I should have got from him to keep the other things going, I can't give any definite figure of what it would come to, because there were lots of things I had to just neglect. If he wasn't making enough to pay the rent of the Front, I couldn't do so.

Q. Did he pay you anything back to pay you for the money you expended on him?

A. He never did. He would always say how sorry he was that he couldn't get any more.

Q. Was he living with you on April 8th, 1926?

A. No, sir.

Q. Was he living——

A. He was living with Mrs. Hudling, he was just running between the two of us, one day he would come to home and the next day go to stay with them.

Q. Taking the difference between what you have expended on behalf of your son and what he give you, how much do you think the balance was that he should have paid you to make it even on what you had paid him?

[fol. 51] A. Of course I feel just like any other mother would, after you bring him up to twenty-two years old, there would have been nothing too much for me to expect from him, after putting him through school. Any money he got outside of his little spending money he was always so willing to give it to us to make things pleasant for us.

Q. Did he give you any money in April, 1926?

A. No, sir, I paid his dues before the first of April.

Q. Did he give you anything in March?

A. I don't remember the time when he did give me anything. I don't remember the date he gave me, or month.

Q. What amount, take the months of January, February, March and April, 1926, those months in which you bought him clothes, and paid his dues. Would the amount that you paid on his behalf be greater than the amount he gave you?

A. I should say, yes, I should say, and speaking truthfully, too.

Q. Was this money that was given, given to you or given to your husband, Mr. Brooke?

A. From my boy? To me, personally, in my own hands.

Q. Do you know whether or not he gave any money to your husband?

A. No, I don't think he did. You never received any money from him, did you?

Q. Was your son the son of Mr. Brooke?

A. No, the son of Mr. Okew.

Q. Your first husband?

A. Yes, he was born in Winnipeg, Canada, twenty years ago today.

Witness leaves stand.

[fol. 52] Sworn as witness and testifying as follows, called by applicants, JOHN ARTHUR BROOKE, party applicant:

Mrs. Brooke: You will have to speak a little loud, because he is hard of hearing.

Examination by Referee:

Q. What is your address?

A. 1623 Ocean Avenue.

The Referee: Examine, Mr. Shippey.

Examination by Attorney Shippey:

Q. You are the husband of Sarah Jane Brooke, who just testified in this matter?

A. Yes.

Q. And John James Brooke is your stepson?

A. Yes.

Q. A son of your wife's former husband?

A. Yes.

Q. You were supported by him in any way?

A. Well, yes, we had to be dependent upon him to a certain extent.

Q. What had you been doing for the year prior to the eighth of April, 1926?

A. I had been helping Mrs. Brooke in apartment houses.
Q. And what doing?
A. Well, the usual work around.
Q. You were working in apartment houses?
A. Working around them.
Q. And on the 8th of April, 1926, what were you doing?
A. I was down on Ocean Front, on the stand with Mrs. Brooke.
[fol. 53] Q. What were your average daily net earnings from that stand?
A. Truthfully speaking, I did not take the accounts in hand. Mrs. Brooke handled all those accounts, therefore I know nothing about them.
Q. Did you ever have any talk with your stepson as to the amount of money he was earning with the Morris Pleasure Fishing Company?
A. I never spoke much to Jack that way, only guiding him. But I remember the morning he was drowned. He used to come in there, and say "How are you, better"? And I would say "I am all right, you watch yourself," and on the morning of the 8th he came in he was——

The Referee: What are you trying to do now? Trying to determine whether the man is entitled to the wages? This is not the Wage Commission or the Labor Commission, this is the Industrial Accident Commission. The evidence in regard to what he might be able to collect as wages is immaterial in this case.
Mr. Shippey: I will not proceed further along that line.

The Referee:

Q. Did your stepson give you any money?
A. Never gave me none, no. I never asked him for any. I left it all for his mother. It was his mother and the boy's jack. I never interfered.

Examination by Mr. Albright:

Q. You testified that you were dependent upon John Uttley Brooke?
A. Yes, to an extent.
Q. To what extent?
A. Because we had to, to make ends meet.

Q. Did he contribute anything to you?

[fol. 54] A. Well, I won't say the amount, but I know his mother said "We will get a dollar or two out of him." Any more than that I didn't——

Q. Do you know of your own knowledge that he ever contributed anything?

A. Yes, he did.

Q. When?

A. I can't say as to the date.

Q. What amount?

A. I couldn't say as to the amount.

The Referee: Anything further?

Attorney Shippey: That is all, as far as we are concerned. I assume it isn't necessary to go further into the accident itself?

The Referee: At a hearing in Long Beach, we went into the cause of this man getting drowned. You see that the testimony given by Captain Morris and this other witness would be considered as evidence in this case. That is all right as far as it went, but I am fearful it might not apply to this particular man himself, so I would like a little testimony along that line as to what part Brooke was playing or doing at the time he was drowned. You haven't been sworn in this case?

Called by defendants, sworn as witness, and testifying as follows, Captain Clifford A. Morris:

Examination by Referee:

Q. What connection did you have with the Morris Pleasure Fishing Company on April 8th, 1926?

A. Boat operator.

Q. Did you know Mr. Brooke—John James Uttley Brooke?

A. Yes.

[fol. 55] Q. What became of him?

A. Drowned, April the 8th.

Q. Did you see him get drowned?

A. No, sir.

Q. What was he doing at the time he got drowned?

A. Trying to rescue a boat from going ashore to destruction.

Q. Was this the same boat that Mr. Gregory was trying to rescue?

A. Yes.

Q. And Brooke was in that crowd with you and the——

A. Yes.

Q. Others going out to rescue the boat?

A. With Captain Morris and Gregory and all.

The Referee: Examine, Mr. Shippey.

Examination by Attorney Shippey:

Q. Who owned this boat that was adrift?

A. She was owned by the Morris Pleasure Fishing Company, Incorporated.

Q. The company that employed Mr. Paul Brooke?

A. Yes.

Q. On this particular morning in question, the 8th of April, did Paul Brooke go out to this boat for the purpose of keeping it from drifting ashore?

A. I didn't—as I stated before, I didn't see the accident myself, but I understood that he went out there.

Q. Were you on the pier when they started?

A. No.

Q. Where were you?

A. I was in San Pedro.

[fol. 56] Q. You know nothing, then, about the accident whatever?

A. Only hearsay.

Q. Except what you heard? You do know, as a matter of fact, however, that John James Brooke was employed by the Morris Pleasure Fishing Company?

A. He was employed as apprentice.

Mr. Shippey: That is all.

Examination by Mr. Albright:

Q. What was Mr. Brooke's salary?

A. Sixty dollars a month.

Q. How was he paid?

A. At the end of every month, as far as I knew. He might have drawn money in between times, they usually draw four dollars or five dollars or ten dollars when they need it.

Mr. Albright: That is all.

Examination by Attorney Shippey:

Q. How do you know his salary was $60.00 a month?
A. We have the blank checks that were paid.
Q. That is the only reason?
A. I understood that—I generally hear of the agreements between the boys and the manager of the company down there.
Q. Was Captain Morris that was drowned any relation to you?
A. Cousin.
Q. It is possible, though, is it not, that there might have been some different arrangement between your cousin and John Brooke as to his salary?
A. No, sir, I don't think so.
Q. What makes you think that that was not so?

[fol. 57] The Referee: It was stipulated in this case that the earnings were $140.00 a month, and that the average weekly earnings may be computed upon that basis. If you are not going to abide by that stipulation we will withdraw the stipulation and take evidence upon what the wages were.

Mr. Shippey: I am satisfied.

Mr. Albright: I will withdraw the stipulation. I didn't know that there was a stipulation there.

The Referee: It is stipulated that the stipulation in regard to the earnings of the employee at the time of said injury be cancelled and stricken from the record, and an additional issue made as to what the wages of the employee were at the time of the injury.

Mr. Shippey:

Q. You say it is not possible that some other arrangement other than that of sixty dollars a month might have been made between Captain Morris and John Brooke?
A. Down there the business is done practically in four or five summer months, and after October the first it drops

off to practically nothing. The business goes behind and usually on the first of October we are called together and our wages are set according to the business we have done the year before. It is usually a big pot. Sometimes the wages are cut into for the winter months. I will have to do the same right now.

The Referee: What was Brooke's wages in April, 1926? What wages was he working for then?

A. I believe they were either eighty or ninety dollars, I wouldn't be certain.

[fol. 58] Mr. Shipley: Might it have been as much as a hundred dollars?

A. I don't think so.

Q. You say he was an apprentice?

A. Yes.

Q. How long had he been working?

A. He had been working there for a year, he hadn't any license, he couldn't get any license. We had his application made out and we were going to go over and get his license so he could run a boat.

Q. Isn't it a fact that upon a number of occasions he did run a boat?

A. He ran a boat with me aboard with a license, he didn't run the boat, I ran her, he was with me.

Q. Who handled the manual operation of the boat itself?

A. Sometimes he did and sometimes I did, but she was under my orders.

Mr. Shippey: That is all.

Mr. Albright: Are you director and officer of the company?

A. I made a statement that I hadn't any, I forgot that I was a director, but the company was so small I didn't remember that.

Q. Did you own any of the stock?

A. Yes.

Q. How much?

A. One-fourth of it, approximately.

Witness leaves the stand.

[fol. 59] Recalled as witness, Mrs. SARAH JANE BROOKE, party applicant:

By Attorney Albright:

Q. Did I understand you to say you paid a doctor bill?
A. Yes, $20.00, he broke his arm.
Q. That wasn't in connection with the accident?
A. No, it wasn't on the boat, he broke it with the car.

Attorney Shippey: I understood it was not connected with this accident, because I anticipate from what I gather from this case that there wasn't any necessity for a doctor after the accident. Is that all?

Adjuster Albright: Yes, except for the Referee.

The Referee: Who saw that accident?

Mr. Albright: John Dugan.

Sworn as witness and testifying as follows: (Called by defendants) JOHN P. DUGAN, 607 Euclid Avenue, Santa Monica:

The Referee:

Q. Was Mr. Brooke in your crew that went out to rescue this boat?
A. Yes.
Q. Was he in the same category as Mr. Gregory?
A. Yes.
Q. Was he in that crowd when the Captain told them "Come on, boys, let us go out and save that boat?"

The Referee: That is all.

Mr. Shipley: Nothing as far as we are concerned.

The Referee: Case submitted.

End of transcript.

[fol. 60] BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

Claim No. L. A. 6044

[Title omitted]

SECRETARY'S CERTIFICATE

I, F. B. Lord, Secretary of the Industrial Accident Commission, hereby certify that the attached is a full, true and correct copy of the testimony in the case entitled Mrs. Jennie Gregory et al. vs. Captain Morris Fishing Company and London Guarantee and Accident Company, L. A. 5986, as had on the 13th day of September, 1926, same being the testimony which was stipulated and agreed between the parties to be considered as evidence and testimony in the above entitled case.

Attest my hand and the seal of the Industrial Accident Commission of the State of California.

F. B. Lord, Secretary. (Seal.)

Dated at San Francisco, California, this 27th day of January, 1927.

[File endorsement omitted]

[fol. 61] BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

L. A. Claim No. 5986

Mrs. JENNIE GREGORY and LENA GREGORY and JOE YORBA, Minors, by Their Guardian ad Litem, JENNIE GREGORY Applicant,

vs.

MORRIS PLEASURE FISHING, INC., and LONDON GUARANTEE AND ACCIDENT COMPANY, LIMITED, Defendants

Report of Hearing—Filed Jan. 27, 1927

This cause came on regularly for hearing on the 10th day of June, 1926, at 10:30 o'clock A. M., at the Chamber of

Commerce Building, Long Beach, California, before Lætus N. Crowell, Referee.

The applicant, Mrs. Jennie Gregory, was present in person, address 559 Sepulveda St., San Pedro, California, and represented the minors.

The defendants were represented by W. E. Albright, Esq., 510 H. W. Hellman Building, Los Angeles, California.

Answer filed by defendants.

R. M. Marshall, reporter.

Good cause appearing therefor, it is hereby ordered that Lena Gregory and Joe Yorba be and they are hereby joined as parties applicant in the above entitled proceedings.

Good cause appearing therefor, it is hereby ordered that Mrs. Jennie Gregory be and she is hereby appointed guardian ad litem of, for and on behalf of said Lena Gregory and Joe Yorba, minors.

[fol. 62] Good cause appearing, it is hereby ordered that the name appearing as Captain Morris Fishing Company be and the same is hereby amended to read "Morris Pleasure Fishing, Inc." wherever the same appears in this proceeding.

STIPULATION AS TO FACTS

It is hereby stipulated by and between the parties hereto:

1. That the defendant London Guarantee and Accident Company was the insurance carrier for the defendant Morris Pleasure Fishing, Inc., on April 8, 1926, and is liable for the normal compensation, if any, which the said Morris Pleasure Fishing, Inc. is liable to pay under the Workmen's Compensation, Insurance and Safety Act of 1917, and the amendments thereto.

2. That Leland Gregory, hereinafter called the employee, was on the 8th day of April, 1926, in the employment of defendant Morris Pleasure Fishing, Inc.

3. That no medical treatment was rendered.

4. That at said time the actual monthly earnings of the employee were $250, and that the average weekly earnings

may be computed upon that basis, and at said time the employee's age was 35 years.

5. That no death benefit or disability compensation has been paid.

6. That the death of the employee occurred on April 8, 1926.

7. That over $150 on the burial expense of the employee has been paid by the applicant Mrs. Jennie Gregory.

ISSUES

The issues in this case are:

1. Was the employment the employee was engaged in on April 8, 1926, maritime employment?

[fol. 63] 2. Was the employee insured?

3. If the employee was injured did said injury arise out of and in the course of said employment, was it proximately caused thereby and did it occur while the employee was performing service growing out of and incidental to the same.

4. Occupation of the employee on April 8, 1926.

5. Dependency.

[fol. 64] Claim No. L. A. 5986

MRS. JENNIE GREGORY et al.

vs.

MORRIS PLEASURE FISHING, INC., et al.

JENNIE GREGORY, applicant, having been first duly sworn, testified as follows:

The Referee:

Q. State your name, please.
A. Jennie Gregory.
Q. You are one of the applicants in this case, are you?
A. Sir?

Q. What is your address?
A. 559 Sepulveda St., San Pedro.
Q. Did you know Leland Gregory during his lifetime?
A. Yes, sir.
Q. Were you his sister?
A. Wife.
Q. When were you married?
A. We was married about fourteen years.
Q. Have you got a marriage certificate with you?
A. I got it, but I have it packed up over there, because I haven't got the things—I got it in my trunk.
Q. Have you just moved?
A. Yes, moved over, and I have not taken nothing out of the box where I had it.
Q. How do you know you got it there?
A. I am sure I got it there.
Q. When did you last see it?
A. I seen it when I moved—a little before, I put it—also his things. It is there, though.
Q. Where were you married.
A. If I looked for it I could get it,—Los Angeles.
[fol. 65] Q. Who performed the marriage ceremony?
A. Witness?
Q. No, was it a justice or priest?
A. A judge of the court.
Q. Judge who performed the marriage ceremony?
A. I cannot remember his name.
Q. Who was witness to this marriage?
A. Some fellow there from the same court, his name was Patterson.
Q. Who was the other witness?
A. That's all. We only had one.
Q. You say you were married fourteen years ago?
A. Yes, sir.
Q. Did you live with Leland Gregory as his wife ever since you were married to him?
A. Yes, sir.
Q. Any divorce between you and Leland Gregory?
A. Never.
Q. Were you ever married before you married Leland Gregory?
A. Yes, sir, I was married before that.

Q. What became of your first husband?

A. I don't know what became of him. We had a separation—got divorced from him.

Q. When did you get a divorce from your first husband?

A. I cannot remember how long it has been.

Q. Did you get a divorce from your first husband?

A. Yes, sir.

Q. Before or after you married Leland Gregory?

A. No, this was before.

Q. What was before?

[fol. 66] A. I got the divorce from my husband.

Q. You got a divorce first from your first husband?

A. Yes, sir.

Q. Before your married Leland Gregory?

A. Yes, sir.

Q. Where did you get that divorce?

A. Up here in Los Angeles.

Q. In what year?

A. I couldn't tell you.

Q. About how many years before you married Leland Gregory was it that you got a divorce from your first husband?

A. I can't remember.

Q. Was it three years, or two years, or five years?

A. Before I married him?

Q. Yes.

A. Oh, it was about a year after I got my divorce. I had to wait and stay a year, then I got married to Leland Gregory.

Q. After the Judge issued you a kind of a paper, you waited a year after that before you married Leland Gregory? What attorney handled your case in this divorce proceeding?

A. Goodrich of San Pedro.

Q. What are his initials?

A. I don't know.

Q. Is Attorney Goodrich still there in San Pedro?

A. He may be there, I don't know, for sure, it has been quite a while.

Q. Who are the parents of Lena Gregory? Who was the father of Lena Gregory?

A. Leland Gregory.

Q. Who was the mother?

A. Jennie Gregory.

[fol. 67] Q. What was the name of your first husband?

A. Tom Yorba.

Q. And is Joe Yorba—is Leland Gregory's stepson?

A. Yes, sir.

Q. How old is Lena Gregory?

A. Twelve years.

Q. And how old is Joe?

A. He is about fourteen.

Q. You got in your application here, seventeen, for Joe, is that a mistake?

A. That he is seventeen?

Q. Yes.

A. About that.

Q. Didn't you say fourteen?

A. How old is he—seventeen.

Q. Who was supporting yourself and these two children on April 8, 1926; who was buying their clothes and feeding them?

A. Mean buying it?

Q. Who did that on April 8, 1926?

A. My old man.

Q. Was Leland Gregory your old man?

A. Yes, sir.

Q. Did you know anyone else that was dependent for support upon your husband, Leland Gregory, besides yourself and these two children?

A. No, sir.

Q. Do you know anything about your husband getting drowned?

A. No, sir, just what I heard, the ones that seen him when he got drowned.

Q. Did you see him after he was drowned?

A. Yes, sir.

Q. When.

[fol. 68] A. After he was drowned—a little after that, they had him at the undertaker's.

Q. What was his occupation on April 8, 1926? What was his business?

A. Working running a boat. Engineer.

Mr. Albright:

Q. What did Mr. Gregory do on this boat?

A. Run the engine.

Q. How far out did they go, do you know?

A. I couldn't tell you about how far it was. They used to go and fish from there.

Q. How long had he been working for Captain Morris?

A. Two years.

Q. Who did he work for before he went to work for Captain Morris?

A. He used to work for Mr. Harris, that fellow that's got a boat up here in Wilmington, that's his first name, used to go out fishing.

Q. Where did they fish then?

A. Different kinds of places, the Islands around.

Q. How long before you were divorced did you know Leland Gregory?

A. I knowed him since he was a boy.

Q. You knew Leland Gregory since he was a boy?

A. Yes, knowed all his family too.

Q. Who paid for your divorce?

A. He did.

Q. Was Joe born before you were divorced?

A. Joe was born when I was married to my first husband.

Q. You were still living with your first husband when Joe was born?

A. Yes.

[fol. 69] Witness excused.

Josephine Morris, 607 Euclid Avenue, Santa Monica, California, witness called by defendants, having been first duly sworn, testified as follows:

The Referee:

Q. What was your occupation on April 8, 1926?

A. I was secretary and treasurer of the Morris Pleasure Fishing Company.

Mr. Albright:

Q. Mrs. Morris, will you kindly explain to the Referee the operations carried on by your company?

A. We have pleasure fishing boats out from Santa Monica carrying passengers out to fish, and they go up and down the coast, sometimes two miles, or two miles and a half offshore, up as far as Point Duma, down as far as Point Vincente, returning to the Municipal Pier at Santa Monica. We have operated there for five years.

Q. How many boats did you operate there, Mrs. Morris?

A. We have five at the present time.

Q. How many did you have on April 8th?

A. Six.

Q. What are the sizes of the boats? Can you give the approximate tonnage?

A. No, I just cannot do that. There is one 36 feet or 38 feet, 42, 48 and 52, I think.

Q. Can you give us approximately the tonnage of the W. K., one of your boats?

A. No, I cannot.

Q. Did you see the drowning of Leland Gregory and Paul Brooke?

A. No, sir, I did not see it, but I saw them working over them, the Captain and I went after Mrs. Gregory.

[fol. 70] Q. How much do you charge the passengers that go out on your boats? What is the fee?

A. One boat makes two trips in the daytime, and it is one fifty for the privilege of both trips; the other boat that remains all day is two dollars, afternoon trip is one dollar.

Q. Do these boats ever go out farther than two and one-half or three miles?

A. No, sir.

Q. Are they captained?

A. They are captained, but it is not necessary, because the fish are usually—sometimes they go over to what they call "the rock-cod bank," about ten miles right straight out. In the winter it is necessary——

Q. Do they ever go to Catalina?

A. No, sir, that would be unnecessary for the fishing.

Q. What was Leland Gregory's duty with your company?

A. He was the boat operator.

Q. And as such he had charge of the motor on the boat?

A. Yes, sir, he had full charge of the boat while she was away from the pier.

Q. Who was the master of the W. K.?

A. Chester Heddon.

Q. He was the man that was in charge of the boat?

A. He was over at San Pedro that day, working, because it was rough, and the boats could not go out, and the others were getting ready to go.

Q. In his absence who was in charge of the W. K. at the time this accident happened?

A. There was no one on board of it at the time.

Q. But who was in charge of the whole, was responsible for it?

[fol. 71] A. Well, it has always been in our work whoever the Captain—he tells the men to go and take another boat, if he is capable of doing that.

Q. You did not see the actual happening of the accident?

A. No, sir.

The Referee:

Q. Do you know whether or not Mr. Leland Gregory was sent out on this boat on April 8th, 1926?

A. I understood from several of the witnesses that they were volunteers to go with my husband to rescue the W. K.

Q. These boats that were furnished by the company of which you are secretary and treasurer were used simply for the purpose of taking passengers out in the ocean and allowing these passengers to fish in the ocean?

A. Yes, sir.

Q. Did you furnish the fishing apparatus for them to fish?

A. No, sir.

Q. They furnished that themselves?

A. They either took their own or rented it.

Q. Did the company which you were connected with have anything to do with this fish that these passengers caught?

A. No, sir, the fish belonged to them.

Q. Did your company go out fishing with these boats, the kind that the employee was in, for the purpose of catching fish and selling those fish?

A. No, sir, we did not commercialize fish.

Q. Then your company business was simply to give passengers pleasure rides on these boats along the coast, allowing them to fish at the same time?

A. Yes, sir.

[fol. 72] It is ordered that the case be set down for further hearing at Los Angeles, upon notice to both parties.

This case to be set at the same time as the Brooke vs. Morris, et al., L. A. No. 6044.

[fol. 73] [File endorsement omitted]

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

Claim Number L. A. 5986

MRS. JENNIE GREGORY and LENA GREGORY and JOE YORBA, Minors, by Their Guardian ad Litem, Jennie Gregory, Applicants,

vs.

MORRIS PLEASURE FISHING, INC., and LONDON GUARANTEE & ACCIDENT COMPANY, LTD., Defendants

Report of Further Hearing—Filed Jan. 27, 1927

This cause came on regularly for hearing on September 13, 1926, at 3:30 o'clock P. M., at 911 Sun Finance Building, Los Angeles, California, before Letus N. Crowell, Referee.

Present:

Mrs. Jennie Gregory, Applicant, in person; address: 559 Sepulveda Street, San Pedro, California. Applicants not represented by any attorney.

Defendants represented by W. E. Albright, Adjuster, 510 H. W. Hellman Building, Los Angles, California.

Mary Beck, Reporter.

Whereupon the following proceedings were had, to-wit: Witnesses: Captain Clifford A. Morris, John T. Dugan.

The Referee: Let the record show that the Applicant produced her marriage certificate, which was inspected by the Referee and the attorney for the defendants, and the same appearing regular on its face, the filing of the same is hereby waived.

Attorney Shippey on Gregory case appearing toward the end of the testimony of Captain Clifford A. Morris.

[fol. 74] **Claim Number L. A. 5986**

MRS. JENNIE GREGORY et al.

vs.

MORRIS PLEASURE FISHING, INC., et al.

TRANSCRIPT OF TESTIMONY

The Referee: Mrs. Gregory, have you anything further to add to what you said at Long Beach?

Mrs. Gregory: No, that is all, I have said all that I had.

The following witnesses, in the Gregory case only, called by defendants:

Captain CLIFFORD A. MORRIS, 607 Euclid Street, Santa Monica, being first duly sworn, testified as follows:

The Referee:

Q. What was your business on April 8th, 1926?

A. Boat operator.

Adjuster Albright:

Q. Were you an officer of the corporation under date of April the 8th?

A. No, not at that time.

Q. You were a boat operator?

A. Yes.

Q. Can you state how many boats were in operation by the Morris Pleasure Fishing Company, Incorporated?

A. Four, I think, at that time, four in operation, two laid up.

Q. Can you count, or approximate, tonnage of each of them?

A. The "Palisades" is fourteen tons; the "W. K." is seven tons, the "Lark" is five tons, and the "Maie" is four tons, that is four.

Q. Were those boats in commission on the date of April the 8th, 1926, and operated by the company at that time? [fol. 75] A. They were being operated different days. They weren't operated on that day.

Q. But they were all in commission?

A. Yes.

Q. What power do they use in operating those boats?

A. Gas engines.

Q. On all of the four boats sailing navigable waters of the Pacific for fishing purposes?

A. Yes.

Q. Where did they usually go to fish?

A. In Santa Monica Bay, as they call it. It is a bay inside of a line drawn between Point Fermin and Point Duma.

Q. About how far from shore?

A. About ten miles, approximately, from the Santa Monica Pier.

Q. Did they ever make any exception to the place where they went fishing? Just describe it yourself.

A. When they land at San Pedro, they went outside, up Santa Monica Bay, for repairs, but they never run outside. They have since, our boats, this summer, have gone outside ten miles, ten miles, but not then.

Q. How far is Santa Monica from San Pedro?

A. Thirty miles, around the shore.

Q. How far out do they go?

A. Not more than five.

Q. Did your corporation engage in the sale of fish on or about April 8th?

A. No.

Q. Does the corporation, or did the corporation, on or about April 8th, run these boats exclusively for the public for the purpose of fishing?

[fol. 76] A. Yes, of course, there were small jobs, like putting out light lines and floats around the pier, there, sometimes free, and sometimes we charged.

Q. For fishermen?

A. No, for clubs, and some for the city.

Q. But you didn't place any nets for your own self, for your own purpose?

A. No.

Q. What was the rate of fare on those fishing excursions?

A. The all-day, about from 8 A. M. to 4 P. M., was charged $4.00, and the two-trip boat was $2.50, if they came at noon and went back.

Q. Did you know Leland Gregory in his life?

A. Yes.

Q. Was he a licensed navigator?

A. He had a boat operator's license.

Q. Is that boat license issued by the United States Government?

A. Yes, Steamship Inspection Service.

Q. How far were these boats capable of cruising?

A. That would depend on the fuel capacity, I should imagine they could run maybe five hundred miles, they could carry that amount of fuel.

Q. Did you witness this accident?

A. No.

Mr. Albright: That is all.

The Referee:

Q. What happened to this Leland Gregory? What was his occupation?

A. He was a boat operator, a master of a boat.

Q. Did you know him?

[fol. 77] A. Yes.

Q. What became of him?

A. He was drowned.

Q. When?

A. On April 8th.

Q. Where?

A. Santa Monica Bay.

Q. What time did he drown?

A. I am not certain, but I think it was around one o'clock.

Q. In the daytime?

A. Yes.

Q. How did he happen to get drowned?

A. He went out in a skiff with two other men, to make an attempt to get aboard a boat that was drifting, and they failed in their efforts to get aboard, and the skiff they were going out in capsized and they were drowned.

Q. Was it part of his duties to do that?

A. No, he didn't have to do it, no. It was voluntary, I believe, he wasn't in any way forced to do that, it was voluntary.

Q. This man Gregory went out to make a rescue of what?

A. Of the boat "W. K.," she was drifting ashore, she had broke her moorings, and was drifting ashore, and they had an idea they could go out in the skiff and get her ashore. She was drifting on the beach.

Q. Whose boat was it that was drifting ashore?

A. It belonged to the Morris Pleasure Fishing Corporation.

Q. Was it proper to have this boat that was drifting go to the shore if it belonged to the defendants in this case?

A. I don't understand.

Q. A boat was out there drifting on the bay?

A. She had broken moorings, and the buoy had broken the moorings, and she was going on the shore, and they thought that they could save the boat from going on the shore, by putting out in a boat, boarding her, which is very [fol. 78] often done in such a case.

Q. Who ran that boat?

A. Chester Hedlan was the boy that was running it that time, I think. Sometimes they shifted them around.

Q. Where is he?

A. He is at Santa Monica now, he is running "Palisades."

Mr. Albright: You meant who had charge of the boat sent out to rescue him?

The Referee: No, the boat that was drifting.

Captain Morris: There was nobody on the boat when she was drifting, there would be none until it was time for the men to go on board.

The Referee:

Q. Was it to the interest of the defendant that the fishing company would want the boat that was drifting and

broke loose from its anchor, and was drifting, boarded and ashore this deceased attempted to do?

A. I don't understand.

The Referee: Read the question.

A. Of course the boat was insured, they would all have benefited by that. They would all have shared alike in salvage if they had boarded the boat.

Q. Because the company carried insurance on this boat they didn't care whether the boat broke loose or not?

A. They are expected to do all they can to save a boat.

Q. Who? Is expected to do?

A. Anybody, I suppose, they can use their own judgment in a case of that kind, I don't know that they are expected.

[fol. 79] Q. Who do you mean by "them"?

A. Anybody that should happen to see the boat going ashore; that is the way among sailors and on the water, if they see anything going to destruction. I don't know that they are required to do it, it is usually expected that somebody should take a chance and try to save property that is going to destruction; that is a standing order among seafaring men.

Q. That is what Leland Gregory was doing at the time, trying to save this boat?

A. Yes.

Q. Was his body ever recovered?

A. Yes.

Q. Anybody else with Gregory at the time?

A. Yes. Horbross and Captain Austin J. Morrison.

The Referee: Next witness.

Called by defendants for the Gregory case, sworn and testifying as follows: John T. Dugan, 601 Euclid Avenue, Santa Monica, California:

The Referee: Examine, Mr. Albright.

Adjuster Albright:

Q. Were you employed by the Morris Pleasure Fishing Corporation on April the 8th?

A. Yes.

Q. In what capacity?

A. Boat operator.

Q. Were you—did you know Leland Gregory?

A. Yes.

Q. What was he, in what capacity was he employed by the Morris Pleasure Fishing Corporation?

[fol. 80] A. Boat operator.

Q. Did you witness the accident that occurred on April 8th, in which Mr. Gregory lost his life?

A. Yes.

Q. Where were you at the time?

A. I was standing on the Santa Monica Pier part of the time and the rest of the time I was in the skiff, trying to save it.

Q. Will you tell the Referee just what happened?

A. Gregory and a bunch of us were—had been resting there, and we stayed in the car, when we got through eating, and Paul Brooks came running up and said that the boat was broke. We got down to the end of the pier and seen that the boat was drifting. All of us fellows looked at it, we thought that we could save it. It looked far enough for us fellows to go get it, and Captain Morris and Paul Brooks and Leland Gregory jumped into the skiff, and I too, ran over to the skiff. We had three sets of oars in the skiff. We started after it, and we got along even until we got within fifty feet of the boat, and a big swell came along, turned the skiff upside down, and threw them into the water. They were struggling, trying to get the skiff back up, and it kept drifting, and a heavy swell running, and the boat kept drifting in all the time, and she turned over. About that time I fixed myself—another fellow and myself, and we loaded the skiff with life-preservers and went after them, and then I didn't see them any more until I got to where they was, and then we couldn't see them and we came on in, and they had gotten Gregory's body and the other two were gone.

Q. How far from the shore, or about how far from the end of the Santa Monica Pier, had the "W. K." been moored?

A. Almost half a mile, within three quarters and a half a mile.

Q. From the end of the shore line?

A. From the end of the pier.

[fol. 81] Q. How far from the shore does the pier extend into the sea?

A. About fifteen hundred feet, Fifteen, sixteen hundred feet.

Q. Did Captain Morris give—Captain Stanton Morris, give any orders to Gregory or Brooks to go out and attempt to save this boat?

A. No, sir, that was all voluntary.

Q. In their usual—Did Captain Morris give orders to anyone?

A. No, sir.

Q. Did the Captain say that he was going out to save the "W. K.?"

A. He came down to the pier, there, and the skiff was lying there. He said, "Come on, boys, let us go get her." That is all he said. We jumped around then, also, as we usually do, we can see what is going to happen, we don't wait for orders in a case like that.

Q. How long have you worked for the Morris Pleasure Fishing Company?

A. Four years.

Q. How long have you known Leland Gregory?

A. Four years.

Q. Was he an experienced navigator?

A. Yes, the best of them.

Q. What was his license?

A. Third or fourth issue.

Q. That would be fifteen or twenty years' experience?

A. Yes.

Q. That is all.

The Referee:

Q. Was Captain Morris in authority over Mr. Gregory?

A. Yes.

Q. When Captain Morris said "Come on, boys, let us save it," was those remarks addressed also to Gregory?

[fol. 82] A. Included all of us boys, every one of us; I was just as well included and jumping as anybody.

The Referee: Any more witnesses?

Adjuster Albright: That is all I have.

The Referee: Let the record show that the Applicant produced her marriage certificate, which was inspected by the Referee and the Attorney for the defendants, and the same appearing regular on its face, filing of the same is hereby waived.

Gregory case submitted.

[fol. 83] [File endorsement omitted]

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

Claim Number L. A. 6044

SARAH JANE BROOKE and JOHN ARTHUR BROOKE, Applicants,

vs.

MORRIS PLEASURE FISHING, INC., and LONDON GUARANTEE & ACCIDENT COMPANY, LIMITED, Defendants

Applicants' attorney, Robert F. Shippey.
Defendants' representative, W. E. Albright.

FINDINGS AND AWARD—Filed Oct. 6, 1926

An application for adjustment of claim for compensation having been filed herein, and all parties having appeared, or having been duly served with process, and the matter having been regularly heard before Letus N. Crowell, Referee, and submitted for decision, this commission makes its Findings and Award as follows:

Findings of Fact

1. John James Uttley Brooke, hereinafter called the employee, while employed as a spare skipper on April 8th, 1926, at Santa Monica, California, by defendant Morris Pleasure Fishing, Inc., sustained injury occurring in the course of and arising out of his employment, as follows: The employee was drowned. Said injury proximately caused the employee's death on April 8th, 1926.

2. At the time of said injury the employee was not engaged in maritime employment and both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917, and the Amendments thereto.

3. At said time the employer's insurance carrier was defendant London Guarantee & Accident Company, Limited.

4. At the time of said injury applicant Sarah Jane Brooke was neither wholly nor partially dependent for support upon the employee.

5. At the time of said injury applicant John Arthur [fol. 84] Brooke was neither wholly or partially dependent for support upon the employee.

6. The reasonable expenses of the employee's burial is the sum of $150.00. Said sum of $150.00 should be paid by said insurance carrier directly to Mendenhall whose address is Fourth Street, Santa Monica, California.

Award

Award is made in favor of Mendenhall against London Guarantee & Accident Company, Limited, of burial expenses in the sum of $150.00 payable forthwith; and

It is ordered that all payments herein awarded shall bear interest at the rate of seven per cent per annum until paid, beginning with the date of this Award or the date thereafter at which payment becomes due; and

It is ordered that applicant Sarah Jane Brooke take nothing from said defendants, or from either of them and that said defendants be and they are hereby relieved from liability to said applicant Sarah Jane Brooke upon the claim herein asserted; and

It is ordered that applicant John Arthur Brooke take nothing from said defendants, or from either of them and that said defendants be and they are hereby relieved from liability to said applicant John Arthur Brooke upon the claim herein asserted; and

It is ordered that defendant Morris Pleasure Fishing, Inc., the employer, be and it is hereby dismissed herefrom.

Industrial Accident Commission of the State of California. John A. McGilvray, John W. Carrigan, Commissioners.

Dated at San Francisco, California, this 6th day of October, 1926.

Attest: J. S. Thomas, Assistant Secretary.

DNC:MGB.
9/23/26.

[fol. 85] [File endorsement omitted]

BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

Claim L. A. 6044

[Title omitted]

PETITION OF DEFENDANTS FOR REHEARING—Filed Oct. 21, 1926

Come now the defendants, Morris Pleasure Fishing Incorporated and London Guarantee & Accident Company Ltd., defendants in the above entitled action, and pray that a rehearing be granted for the following reasons:

I

That the Commission acted without or in excess of its powers;

II

That the evidence does not justify the findings of fact;

III

That the defendant has discovered new evidence, material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.

IV

That the findings of fact do not support the award.

The reasons above advanced for the granting of a rehearing of this action are based on the following facts and authorities:

[fol. 86] I

The testimony introduced at the hearing shows that John James Utley Brooke, the employee, was employed by the defendant as a spare skipper in connection with the operation of the several vessels operated by the defendant. The defendant owned and operated four fishing vessels of four, five, seven and fourteen ton registry which were operated upon the navigable waters of Santa Monica Bay, Pacific Ocean, on or about April 8, 1926. The defendant operated these boats exclusively for the benefit of passengers, charging a fixed price or fare for a trip to the fishing banks ten miles off shore where the passengers of the vessel could engage in fishing if they so desired, the employees of the defendant did not engage in fishing. Neither the defendant nor their employees engaged in the selling of fish.

The duties of the employee were those incidental to assisting in the operation of the boats upon navigable water. At the time of the accident which resulted in the drowning of John James Utley Brooke, the employee, accompanied by Leland Gregory and Thornton J. Morris were attempting to reach and board the vessel W. K. which had been riding at anchor approximately three-quarters of a mile from shore on the navigable waters of Santa Monica Bay and the Pacific Ocean which, during the storm which was in progress at the time, broke loose from its anchorage, started to drift and headed for the Santa Monica Pier. To save the doomed vessel, the three men set out in an 18 foot skiff on the navigable waters of the Pacific Ocean and had reached a point within fifty feet of the vessel W. K. when a large comber or swell capsised the skiff throwing the three [fol. 87] men into the sea. The aforesaid operations were all performed upon navigable waters, the contract of employment under which the employee was employed at the time of his drowning, was a maritime contract, the work in which the employee was engaging at the time of his drown-

ing was maritime, the drowning occurred upon navigable waters.

II

In determining whether a contract be of a maritime nature, the true test is the subject matter of the contract—the nature and character of the work to be done.

State Industrial Commission vs. Hordenholt Corpn. 259 U. S. 263; 259 Rep. 271; 66 Led. 933.

There was of course no formal or written contract between the employee and his employer—nothing except the contract which is implied from the employment itself. To determine then, whether employees contract of employment was maritime, we must look to the nature and subject matter of the employment.

III

In determining whether the work in which the employee was engaged at the time of his drowning, was of a maritime nature, consider the definition of "maritime," as found in Black's Law Dictionary.

"Maritime," pertaining to the sea or ocean, or the navigation thereof; or to commerce conducted by navigation of the sea or (In America) of the Great Lakes and Rivers.

The employee was engaged in work of a nature pertaining to navigation of the sea, upon navigable waters of the sea.

Whether an employment in any given instance is maritime depends exclusively whether the service to be performed is of a maritime nature—that is, normally—a service connected with navigation or commerce upon navigable waters.

[fol. 88] Atlantic Transport Co. vs. Imbovek, 234 U. S. 52; 53 Led. 1208.

The employee was employed upon navigable waters and engaged in work as a member of the crew in connection with the operation of vessels and at the time of his drowning, was attempting to reach and board a vessel that had broken

loose from its anchorage and was drifting upon navigable waters.

IV

In determining whether the drowning occurred upon navigable waters, it must be admitted that the waters of Santa Monica Bay are in general navigable in the sense here contended, in fact, must be considered navigable under any test. Navigable waters are waters capable of being navigated, that is, navigable in fact;

The Genesee Chief vs. Fitzhugh, 53 U. S. 1058; 12 How. 443; *53 U. S. 1058;* 13 L. ed. 1058.

The Montebello, 20 Wall. 430; 87 U. S. 391; 22 L. ed. 391.

The Daniel Bell, 10 Wall. 557; 77 U. S. 999; 19 L. ed. 999.

The waters here concerned were not only capable of being navigated, but were actually navigated by the vessels of the defendant and it can not be held other than that the movements of these vessels over and about the waters of Santa Monica Bay is navigation thereof and hence a maritime matter.

In determining whether the Industrial Accident Commission of the State of California has jurisdiction over the issue herein raised, it has been heretofore pointed out that the work in which the employee was engaging, was maritime in its nature, his employment was a maritime contract, the drowning was likewise maritime and the rights of the parties in connection therewith, are likewise maritime, and [fol. 89] the rights and liabilities of the parties concerned, are therefore matters clearly and exclusively within the admiralty jurisdiction.

Southern Pacific Co. vs. Jensen, 244 U. S. 205.

Chalentia vs. Luckenbach S. S. Co., 247 U. S. 372.

Alaska Packers Assn. vs. Ind. Acc. Com., 218 Pac. 561.

Zurich Gen'l Acc. Com. vs. Ind. Acc. Com., 218 Pac. 563.

Robbins Dry Dock & Repair Co. vs. Lars Dahl, — U. S. Sup. Ct. 372.

Now, therefore, the defendants herein pray that this petition for rehearing be granted.

Morris Pleasure Fishing, Inc., and London Guarantee and Accident Company, Ltd., a Corporation, by W. E. Albright, Manager of Claims.

[fol. 90] *Duly sworn to by Wm. Albright. Jurat omitted in printing.*

[fol. 91] BEFORE THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA

L. A. No. 6044

ORDER DENYING PETITION FOR REHEARING—Filed Nov. 5, 1926

[File endorsement omitted.]

Good cause appearing therefor:

It is hereby ordered that the petition for rehearing filed by defendants on October 21, 1926, be, and the same is hereby denied.

Industrial Accident Commission of the State of California. John A. McGilvray, John W. Carrigan, Commissioners.

Attest: F. B. Lord, Secretary. (Seal.)

Dated at San Francisco, California, this 5th day of November, 1926.

[fol. 92] IN SUPREME COURT OF CALIFORNIA

No. —

LONDON GUARANTEE & ACCIDENT COMPANY, LTD., Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA, Sarah Jane Brooke, and John Arthur Brooke, Respondents

PETITION FOR HEARING IN THE SUPREME COURT AFTER FINAL DECISION BY THE DISTRICT COURT OF APPEALS, SECOND APPELLATE DISTRICT, DIVISION TWO

To the Hon. William H. Waste, Chief Justice, and Assistant Justices of the Supreme Court, of the State of California:

Respondents Industrial Accident Commission of the State of California, and Sarah Jane Brooke and John Arthur Brooke, respectfully petition this Court for hearing in the above entitled matter and for the transfer of said cause to this Court after final decision of the District Court of Appeal-, Second Appellate District, Division Two.

The opinion and judgment of the District Court of Appeal was rendered May 26, 1927, and became final on June 25, 1927. This petition is filed within ten days thereafter. A copy of the opinion of the District Court of Appeal is attached to this Petition as exhibit "A."

The question presented in this proceeding summarized down to the last analysis is:

[fol. 93] Was the business of the employer and general employment contracted for of such a nature as to bring it under the EXCLUSIVE jurisdiction of the admiralty courts calling for the application of the maritime law?

OR

Was it ESSENTIALLY A LOCAL MATTER permitting the application of the rule laid down in *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, as follows:

"Under such circumstances regulation of rights, obligations, and consequent liabilities of the parties, as between

themselves, by a local rule, *would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in* ITS INTERNATIONAL OR INTERSTATE RELATIONS. (Capitalizing and underscoring ours.)

The question presented must be determined upon a close and careful analysis of the facts found in the case at bar. The dominant facts are:

(1) The business of the employer was entirely local to the City and Port of Santa Monica, a pleasure concession pure and simple.

(2) Not the slightest taint of interstate or foreign commerce.

(3) At and prior to the injury, the vessel "W. K." was not in active service. On the contrary, it was deserted and anchored.

(4) The deceased employee at the time of the injury was not a member of the crew of the vessel "W. K.," but on the contrary his effort to reach this drifting vessel was being made pursuant to his general duties in the general employment (both upon land and navigable waters) with his employer.

(5) Part of the employer's business involved the use of vessels operating upon the waters of Santa Monica Bay.

(6) The deceased employee was employed to assist in operating these vessels.

(7) The injury occurred upon waters susceptible to navigation.

[fol. 94] These latter facts invoke the jurisdiction of the admiralty courts as a general proposition, but (and again we state the question):

"Will the enforcement of the state compensation act work any material prejudice to the characteristic features of the general maritime law or interference with the proper harmony or uniformity of that law in its international or interstate relations?"

Determination of this question we most respectfully submit largely depends upon the attitude taken by the court toward its own state statute, and above all shall depend upon the court's ability to adhere to fundamental principles and to clearly think its way through the chaos created by decisions heretofore rendered in maritime matters.

The attitude of some courts is as follows:

"*I believe in giving force to our statutes* unless for some very clear reason they appear to be unconstitutional. Like all new subjects for legislation and judicial action, the rights of the working man under our two jurisdictions must be slowly and gradually developed. We cannot expect that all wisdom will be expressed in the first decision. Man is not infallible, and time develops many new viewpoints. In this process of adjustment, we must not be too ready to criticise decisions or find fault with uncertainties. The courts do the best they can. *It is in this attitude that I approach the decision in this case, and feel that until the United States Supreme Court has decided that state Legislatures can in no way legislate for the benefit of longshoremen I have decided to cast my vote in favor of our state statute* and the right of such men to take compensation under the Workmen's Compensation Law."

Fitzgerald vs. Harbor Lighterage Co., 155 N. E. 74, p. 77.

(Underscoring ours.)

"The principles by which this court must be guided were stated in Gillard's case, 244 Mass. 47, 51, 52; 138 N. E. 384, 385, 386, in these words:

'The Workmen's Compensation Act therefore must be and is interpreted as intended only to operate upon the classes of employment and injuries within the jurisdiction of the General Court. On the other hand, the words of [fol. 95] the act and its chief amendments render the connection irres-tible that the General Court intended to make the act applicable to all classes of injuries therein described which are within its jurisdiction. The statute is as broad as the jurisdiction of the commonwealth.' (citing cases) 'In none of the cases which have come before us since the decision of the Southern Pacific Co. v. Jenson' (citation) 'have we undertaken to delimit the jurisdiction of the commonwealth under the Workmen's Compensation Act fur-

ther than to apply to specific cases the principles of that decision as we understood them.' (citing cases) 'The language of that act, in view of its beneficient purposes, ought not to be narrowed any further than judicial bounds demand. So far as our own decisions are concerned, we are quite at liberty to extend the Workmen's Compensation Act to any cases to which it is applicable under adjudication of the Supreme Court of the United States and it is our duty so to extend it in order to effectuate the intention of the legislature.' Toland's case. 155 N. E. 602."

The law maritime is notoriously incomplete as will be more fully hereinafter pointed out. Interpretations by the various courts of the scope and effect of the law maritime and of the limits to the jurisdiction of the admiralty courts has produced a long line of confused authorities on the question presented in this proceeding which we again restate to be:

What is the extent of the application of the state compensation act to injuries received by one working upon a boat afloat in navigable waters. Is the same within exclusive admiralty jurisdiction or upon the facts found in the case at bar is it of such a local nature that assertion of jurisdiction by the local courts and application of the provisions of the Workmen's Compensation Act will work any material prejudice to the characteristic features of the General Maritime law or interfere with the proper harmony or uniformity on that law in its international or interstate relations.

In a well considered case, Mr. Justice Day of the Supreme Court of Ohio presents an analysis of maritime decisions which I believe will be of inestimable value to this [fol. 96] court in determining the question herein presented. In State ex rel. Cleveland Engineering Construction Co. v. Duffy et al., 148 N. E. 572, 574, the court says:

"Under these contracts of employment do the rights and liabilities have a direct relation to navigation? And would the application of the local law (Compensation Act) materially affect *any of the rules of the sea* and thereby the uniformity which is essential to maritime law?

• • • • • • •

"With these definitions in mind, what is the character of work for which the plaintiff herein contracts with its employees?

* * * * * * *

"A careful examination of the range of work which the employees of plaintiff performed *would seem to disclose nothing that had a direct bearing upon the maritime service, navigation, or maritime commerce, either interstate or foreign.* * * *" (Underscoring ours.)

The court then proceeds to show that there are two parallel lines of decisions, one line having its basis in the decision of the United States Supreme Court in the Jensen case (Southern Pacific Co. v. Jensen, 244 U. S. 205), the other having its basis and inception in the Rohde case (Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469).

The court goes on to say:

"A large number of cases may be cited which adopt the principle announced in Southern Pacific Co. v. Jensen, supra, but all that class of cases is founded upon some conflict of the law of the sea or maritime law with the local statute. These cases often relate to stevedores or longshoremen unloading the cargo of vessels or artisans working upon a vessel *engaged in interstate or foreign trade; in fact, all of them have some direct bearing upon maritime law.* On the other hand, the courts distinctly recognize a group of cases, of which Grant Smith-Porter Ship Co. v. Rohde, supra, is the leading case, *all founded upon the principle that their provisions were found not to be in conflict with any essential feature of the general maritime law.* Industrial Commission of N. Y. v. Nordenholt Corp., 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. [fol. 97] 1013, is of this class; also Western Fuel Co. v. Garcia, Adm'r, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210. *The difference is distinctly noted in Washington v. W. C. Dawson & Co.* and Industrial Accident Comm. of Cal. v. James Rolph Co., 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646; also Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed., decided January 5, 1925. In these last three cases the rights and liabilities of the parties arose out of and depended upon general maritime law, and

could not be enlarged or impaired by statute. To the same effect is the holding in Alaska Steamship Co. v. McHugh, where the Supreme Court determined that the so-called First Employers' Liability (federal) Act (U. S. Comp. St. Secs. 8657-8665) did not apply to purely maritime torts, decided April 13, 1925, 45 Sup. Ct. 396, 69 L. Ed. —.

"Among the state courts recognizing the doctrine here held may be cited Berry v. Donovan & Sons, 120 Me. 457, 115 A. 250, 25 A. L. R. 1021; also Wooley v. E. M. Wichert Co., 275 Pa. 167, 118 A. 765. In this case the plaintiff's husband was employed as a foreman on a derrick boat, which was anchored in a harbor on a navigable river, and was used for excavating purposes, and it was held that the employment was nonmaritime. In Millers' Indemnity Underwriters v. Boudreaux (Tex. Civ. App.) 245 S. W. 1025, the cause of action arose out of the death of a diver in a navigable stream working off a floating barge. It was held that it was not shown by the evidence to be maritime in nature as regarded the right to compensation under the Workmen's Compensation Act. *This case distinctly recognized the Grant Smith-Porter Ship Company Case, supra,* and the Nordenholt Corp. Case, supra, *and said that, had those cases been before the court when Home Life & Accident Co. v. Wade (Tex. Civ. App.) 236 S. W. 778, was decided, the conclusion would have been different, and the rule announced in Grant Smith-Porter Ship Co. and Nordenholt Corp. Cases adopted.* To the same effect are the cases of Employers' Liability Assurance Corp., Ltd., v. Industrial Accident Comm., 177 Cal. 771, 171 P. 935; Los Angeles Shipbuilding and Drydock Co. v. Industrial Accident Comm. 57 Cal. App. 352, 207 P. 416; Gillard's case, 244 Mass. 47, 138 N. E. 384; Bockhop v. Phœnix Transit Co., 97 N. J. Law, 514, 117 A. 624; Wooley v. E. M. Wichert Co., 275 Pa. 167, 118 A. 765; Lumbermen's Reciprocal Ass'n v. Adcock (Tex. Civ. App.) 244 S. W. 645; Riedel v. Mallory Steamship Co., 196 App. Div. 794, 188 N. Y. S. 649; Lawton v. Diamond Coal & Coke Co., 272 Pa. 74, 115 A. 886; Travelers' Ins. Co. v. Bacon, 30 Ga. App. 728, 119 S. E. 458; Zahler v. Department of Labor and Industries, 125 Wash. 410, 217 P. 55.

[fol. 98] "Other states have reached conclusions denying the application of the workmen's compensation statutes fol-

lowing the rule of the Jensen Case, but an examination of those cases will disclose that the contract of employment and services rendered were maritime in character. A good case illustrating this viewpoint and citing many authorities is O'Hara's Case and Brandeis' Case, decided by the Supreme Judicial Court of Massachusetts, 248 Mass. 31, 142 N. E. 844. This is a well-considered case, and distinguished Gillard's Case, 244 Mass. 47, 138 N. E. 384. Other cases recognizing the maritime principle of the Jensen Case are Doey v. Howland, 224 N. Y. 30, 120 N. E. 53, followed in Anderson v. Johnson Lighterage Co., 224 N. Y. 539, 120 N. E. 55; Newham v. Chile Exploration Co. 232 N. Y. 37, 133 N. E. 120, 25 A. L. R. 1018; Thornton v. Grand Trunk Milwaukee Car Ferry Co., 202 Mich. 609, 168 N. W. 410; Neff v. Industrial Comm., 166 Wis. 126, 164 N. W. 845.

"Many other cases could be cited illustrating this viewpoint, but, as noted above, all of them rest upon the maritime character of the work in which the injured was engaged and direct relation to navigation.

"*The appplication of this character of cases must be denied in the present instance,* for THE REASON IT DOES NOT APPEAR BY THE ALLEGATIONS OF THE PETITION THAT A SINGLE ONE OF PLAINTIFF'S EMPLOYES WILL EVER COME IN CONTACT WITH A VESSEL ENGAGED IN COMMERCE, FOREIGN OR DOMESTIC, INTRASTATE OF INTERSTATE, *OR WITH NAVIGATION IN ITS GENERALLY ACCEPTED MEANING.*

"It is of course difficult to lay down a hard and fast rule which is to apply in all cases where the employment is close to the line as to being maritime or otherwise, and it is possible that plaintiff may some time have a case involving maritime service, but from the language and allegation of the petition *we are disposed to classify the service therein averred as nonmaritime in character, even though rendered 'on floating vessels in navigable waters.'*

"The principles applicable to this case are thoroughly discussed in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, 25 A. L. R. 1029, 31 A. L. R. 518.

"From an examination of the many authorities *we believe the rule to be* that, unless some interference with

maritime law and navigation or maritime trade is shown, recovery under state compensation laws will be allowed, [fol. 99] where the parties have contracted with reference thereto and desire to regulate their rights thereby.

"We therefore reach the conclusion that under the averments of this petition the character of the work stated would seem to show no invasion of maritime law, and the fact that the parties have contracted with reference to the state law and desire to come within the state Compensation Act, the nature of their employment *showing no invasion of maritime law*, we do not feel justified in denying the relief the Petition seeks."

(Underscoring and capitals ours.)

The decision of the District Court of Appeal (Exhibit "A" attached hereto) is proof of exhaustive reading in maritime law on the part of the court. It shows, however, an adherence to line of decisions adopting the principle laid down in the Jensen Case, supra. The attitude of the District Court of Appeal in this decision is, we must respectfully submit, contrary to the attitude taken by this Court in its recent decisions made in City of Oakland v. Industrial Accident Commission, 198 Cal. 273; Alaska Packers v. Industrial Accident Commission, 73 C. D. 330.

Why the District Court of Appeal took this ultra conservative attitude in the face of the language of this Court in the Peterson and Paul Cases, supra, is hard to say. That it did take an ultra conservative attitude cannot be disputed, for the District Court says:

"It can hardly be said that the body of judicial decisions is sufficiently diversified as yet to permit any broad generalization definitive of the class called cases of local concern. The law of the subject is still in a formative stage, and intervening between the dominant maritime class and the territorial class is a twilight zone which will doubtless narrow, little by little, as the marginal lines become more sharply delimited under the process of judicial paring. At present we may, however, make certain general deductions from the decisions of authoritative rank" (page 15 of decision).

[fol. 100] The District Court then goes on to state these certain general deductions and specifically finds—

" • • • The case at bar, which, *possessing no affinity with cases of mere local concern*, must take its place in the realm over which admiralty reigns supreme." (Underscoring ours.)

In reaching this ultimate decision, the District Court of Appeals does not point out the facts wherein the case at bar possesses no "affinity with cases of mere local concern"; nor does the District Court in this decision rendered indicate how the application of the local law or workmen's compensation act to the case at bar can possibly prejudice the, or any particular, characteristic features of the general maritime law; nor does the District Court of Appeals illustrate or show or establish how the uniformity and proper harmony of the maritime law in its international or interstate relation can be interfered with in the case at bar.

These questions arise automatically:

1. What is the general maritime law?

a. What are its characteristic features?

1. How can they be prejudiced by a local compensation insurance act applicable to citizens of this state who are not engaged in interstate or foreign commerce?

2. How can they be prejudiced by enforcement of a contract of insurance entered into between two parties for the benefit of a third party in a local or state court given exclusive jurisdiction to enforce that contract—patently not a maritime contract.

b. What constitutes the "uniformity and proper harmony" of the general maritime law?

1. Is this "uniformity and proper harmony" compulsory in all matters to which the general maritime law extends generally, or it is vital only in its international or interstate relations?

[fol. 101] 2. Wherein does the Workmen's Compensation Act—not maritime law—come into conflict with any superior maritime law which has no compensation features or remedies—when applied to the facts found in the case at bar?

Direct answers to these questions are not found in the Decision of the District Court of Appeal. No effort is made by that Court to settle these questions for future guidance in other cases.

The following analysis may assist the Court in apperciating the tremendous importance of these questions:

I

Extent of Admiralty Jurisdiction

Jurisdiction of the Admiralty Courts rests upon a constitutional grant to the Federal government. Congress conferred upon the District Court of the United States original and exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it.

"• • • The admiralty and maritime jurisdiction of the United States • • • is to be interpreted by a more enlarged view of its essential nature and objects and with reference to analogous jurisdictions in other countries constituting the maritime commercial world • • •"

Benedict on Admiralty, Vol. 1, p. 8.

"• • • Those powers of government which especially *affect our intercourse with foreign nations and their subjects or regulate matters of interstate concern* and the rights in one State of citizens of another State • • • were granted to the general government. *By this distribution of power our intercourse with other nations was to be so regulated as to make us one of the family of nations,* acknowledging the laws and respecting and adopting the usages which constitute the rule of international intercourse, and the several States were to be prevented from making conflicting laws on subjects of national interest and so destroying the harmony which alone could make us and keep us a nation, the United States." (Underscoring ours.) [fol. 102] Benedict on Admiralty, Vol 1, p. 10.

"• • • At the time of the adoption of the Constitution, there were no courts of the United States and a purely ad-

miralty court was not necessarily contemplated as none has since been established, but it was evident that in the multifarious transactions on the ocean, seas, lakes and rivers, *the highways of our intercourse and commerce among the several States and with the nations of the world* questions would continually arise upon which *the law of nations and the law of maritime commerce, the maritime law.* * * * In no manner could a uniform administration of *that great branch of the law of nations, known as the general maritime law,* be secured except by the transfer of all cases of admiralty and maritime jurisdiction to the cognizance of the national judiciary and by committing to Congress the authority to make all laws necessary and proper to carry into execution the power so vested, as by altering and amending the maritime law under which such cases are adjudged. In the exercise of their admiralty jurisdiction, the Federal courts are not bound by State statutes and State legislation, though recognized in remedial aspects consistent with the general principles and uniform operation of the maritime law, is not permitted to displace the characteristic features of the maritime law or to impair that uniformity which *in international and interstate relations* the Constitution designed to establish in conferring the maritime power upon the United States." (Underscoring ours.)

Benedict on Admiralty, Vol 1, pages 12 and 13.

"It is true that the commercial power conferred by the Constitution is one without limitation. It *authorizes* legislation with respect to all subjects *of foreign and interstate commerce,* the persons engaged in it, and the instruments by which it is carried on. And legislation has largely, so far as commerce by water is concerned, with the instruments of that commerce. * * *" (Underscoring ours.)

Sherlock vs. Alling, 93 U. S. 99, p. 103.

"When the Constitution of the United States was adopted, each state had its own regulations of pilotage. While this subject was embraced within the grant of power *'to regulate commerce with foreign nations and among the several states.'* (Art. I, Sec. 8.) (Underscoring ours.)

[fol. 103] *Anderson vs. Pacific Coast S. S. Co.,* 225 U. S. 187, p. 195.

"The jurisdiction thus conferred embraces two classes of civil cases. The first respects *acts or injuries done upon navigable waters.* The second respects *contracts* purely maritime, and *touching rights and duties pertaining to commerce and navigation.*" (Underscoring ours.)

Netherlands, etc. Co. v. Gallagher, 282 Fed. 171, p. 173.

"*There is doubtles an internal commerce which is subject to the control of the states. The power delegated to Congress is limited to commerce among the several states or with foreign nations and with the Indian tribes.* This limitation necessarily excludes from federal control all commerce not thus distinguished, and of course that commerce which is carried on entirely within the limits of a state and does not extend to or affect other states. * * *

The Daniel Ball, 77 U. S. 557, p. 565.

The jurisdiction of the Federal courts is a jurisdiction to regulate interstate and foreign relations; the Federal courts in admiralty only with respect to interstate and foreign commerce and the ships that carry it, or contracts with or torts to persons that directly assist in its continued movement. This jurisdiction of the admiralty court in maritime matters therefore exists only because of interstate and foreign commerce as such.

The Van Smith, 4 Wheaton 438;
The Lottawanna, 21 Wall. 558;
Hughes on Admiralty, 2nd Ed. Sec. 49.

It is proper enough to include those matters incidental to, or relating to, or necessary to, the continuance or furtherance of this international and foreign commerce, including the regulation of ships while actually engaged therein and persons assisting therein; to include the traffic rules of the sea, the questions of contracts and torts arising therefrom, and of damages, towage, pilotage, and such other matters as are incidental to interstate and foreign commerce. The admiralty court administers the maritime law, which is the [fol. 104] international law of nations, applying to commerce and ships navigating the sea in carrying that commerce. The maritime law originated with the use of ships in transportation; ships, in turn, originated from the neces-

sities of transportation of commerce; all three, namely, maritime law, ships and commerce have developed through the centuries together. Fundamentally, transportation is the basis of all three. Ships would not navigate the seas but for the needs of transportation and commerce. The maritime law would be unknown were it not for transportation and commerce in its foreign and interstate relations.

II

Defining "Navigable Waters"

In Daniel Ball, 77 U. S. 557, 563, cited in 1870, the Supreme Court of the United States says:

"A different *test* must therefore be applied *to determine the navigability of our rivers.* They construe navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." (Underscoring ours.)

On page 565:

"*There is doubtless an internal commerce which is subject to the control of the states.* The power delegated to Congress is limited to commerce or among the several states or with foreign nations and with the Indian tribes. *This limitation necessarily excludes from federal control all commerce not thus distinguished,* and of course that commerce which is carried on entirely within the limits of a state and does not extend to or affect other states. So far as she was employed in transporting goods destined for other states or goods brought from without the limits of Michigan and destined to places within that state, she was engaged in commerce between the states, and however limited that commerce may have been, she was so far as it went, subject to the legislation of Congress. She was employed as [fol. 105] an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from

one state to another, commerce in that commodity between the states is commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state and some in two or more states, does in no respect affect the character of the transaction to the extent in which each agency acts in that transportation. It is subject to the regulation of Congress." (Underscoring ours.)

These views and this definition of the navigability of waters was reaffirmed in The Montebello, 87 U. S. 430, decided in 1874. Whether waters are "navigable waters" or not is dependent upon the transportation over those waters of interstate or foreign commerce. The admiralty courts, therefore, have jurisdiction, not over the waters because they are navigable in fact but have jurisdiction over the waters and injuries occurring upon those waters when those waters are navigated in and in connection with interstate and foreign commerce.

III

Defining the Word "Vessel"

Petitioner defines the word "vessel" to mean any watercraft used as capable or being used as a means of transportation on water. For ordinary usage that definition is sufficient. But as the word "vessel" is used in connection with maritime matters and by the admiralty courts, it calls for a more complete definition.

"Evidently, there is here a misapprehension as to the basis of admiralty jurisdiction. It does not extend to ships merely because they are ships, *but to commerce and navigation*, and *to ships* only because they are and *while they are used in commerce and navigation.*" (Underscoring ours.)

Olson v. Birch, 133 Cal. 479, p. 483.

"* * * but here the contract for holding the corn in storage did not concern navigation. It was to be performed at a time when the vessel was not engaged in commerce or navigation or in preparation therefor. * * *"

The Richard Winslow, 71 Fed. 426, p. 428.

[fol. 106] "Because the ship was afloat when used as a warehouse does not render the contract for storage a maritime contract, any more than in the case of a floating warehouse, a floating saloon, or a floating church. Such employment does not pertain to navigation with which alone the admiralty is concerned. * * *"

The Richard Winslow, supra, p. 429.

"* * * The jurisdiction * * * extends only to such vessels when they are engaged in commerce between different states or territories. It does not apply to vessels engaged in domestic commerce of a state; * * *"

The Propeller Genesee Chief et al. v. Fitzhugh et al., 53 U. S. 443, p. 457.

IV

Defining the Word "Maritime"

There is a definite distinction between the word "maritime" and the word "marine," though both are used freely in matters pertaining to the sea.

"A service is not necessarily a maritime service, because rendered on the high seas or on navigable waters. It must have some relation to commerce or navigation; *some connection with a vessel employed in trade*, with her equipment, her preservation, or the preservation of her crew."

Cope v. Vallejo Drydock Co., 16 Fed. 924, p. 925.

"*The same transaction may be maritime in one case and not maritime in another.* As emphasizing this distinction, there is the maxim that 'a ship is made to plough the seas, and not to lie at the walls.' Hence, wharfage rendered to a ship while loading or unloading, or in her regular use as a freight-earning enterprise, is a maritime contract.

"On the other hand, wharfage to a ship laid up for the winter while waiting for the season to open is not maritime.

"This distinction is further illustrated by the decisions in relation to watchmen on vessels. Those who are watchmen while vessels are in port during voyages are considered as having made a maritime contract, but those who have charge of her while laid up have no such contract." (Underscoring ours.)

Hughes on Admiralty, 2nd Ed. p. 22.

[fol. 107] This principle is adopted in the matter of Industrial Accident Commission vs. Payne, 42 S. Ct. 489. The principle of that decision is that the degree of connection of the instrumentality with interstate commerce is to be determined by its service and relation to actual commerce at the moment of the injury, not its past or future service.

"If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and commerce or navigable waters, was quite sufficient."

Atlantic Transport v. Imbroveck, 234 U. S. 52, p. 62.

"But in cases of this character, the locality of the injury is not the sole and exclusive test; the services to be performed must also be of a maritime nature. This was illustrated in Grant Smith-Porter v. Rohde, 257 U. S. 469 * * *"

Ex Parte Havard (Ala.) 100 So. 897, p. 900.

See also:

Eclipse Mill Co. v. Department of Labor and Industries, 251 Pac. 130.

Grant Smith-Porter v. Rohde, 257 U. S. 469.

From the foregoing and many other decisions carefully studied, it is plain that the courts in admiralty matters using the word "maritime" must first ascertain that the subject to which it is applied pertains to commerce and navigation in its interstate and foreign aspects. A tort is not a "maritime tort" merely because it occurs upon navigable waters. A contract is not a "maritime contract" merely because it involves or pertains to a ship afloat. A service is not a "maritime service" merely because it is to be performed or partially performed upon navigable waters or upon a ship afloat on navigable waters and a business is not a "maritime business" merely because part of the business involves the use of navigable waters.

"It is now established that it is not merely the uniformity of the general maritime law which is essential but the uniformity of the general maritime law *in its interstate and* [fol. 108] *international aspect*, and that maritime injuries

of a local significance may still be governed by the state compensation act." (Underscoring ours.)

Grant Smith-Porter Ship Co. vs. Rohde, supra;
Western Fuel Co. vs. Garcia, 42 S. Ct. 89;
State, etc., New York vs. Nordenholt Corp. 42 S. Ct. 473;
Miller's Ind. Underwriters vs. Braud, 46 Sup. Ct. 194;
Eclipse Mill Co. vs. Dept. of Labor and Industries, 251 Pac. 130.
City of Oakland vs. Industrial Accident Commission, 198 Cal. 273; (Paul.)
Alaska Packers Association vs. Industrial Accident Commission, 73 C. D. 330.

The Award of the Commission Does Not Conflict with the Admiralty Jurisdiction

The position taken by the Commission is an alternative one: first, on the facts as found in the case at bar that the admiralty courts had no jurisdiction; and, secondly, that the state courts, i. e., Industrial Accident Commission had concurrent jurisdiction with the admiralty courts.

I

The Facts Conferred no Jurisdiction upon the Admiralty Courts

That the admiralty courts are without jurisdiction from the facts as stated in the case at bar is shown in the following way:

1. The business of the employer was a local pleasure concession business in no way connected with that commerce and navigation as controlled by the admiralty courts. It was not primarily a maritime business. Though it involved a use of the sea, of the operation of vessels upon navigable waters, and the carriage of passengers for hire, it still was not a maritime business in the sense that the word "maritime" is used in connection with the maritime law in the admiralty courts. It was a business purely local [fol. 109] to the city of Santa Monica. There was no port

to port commerce, no interstate or foreign commerce carried by these vessels. It should be termed a "marine" or "non-maritime" business rather than a "maritime" business.

2. The deceased employee was neither on board nor a member of the crew of any vessels carrying passengers for hire at the time of the injury. He was merely on board an eighteen-foot skiff, sent out from the land to reach a deserted drifting vessel, which at the time it started to drift was equivalent only to a floating dock or raft or any other piece of valuable personal property. This vessel while anchored just prior to its drifting and during the time it drifted was not engaged in the navigation of the seas for the transportation of any commerce, either local or interstate or foreign in character.

3. The injury and death of the deceased employee was not a maritime tort. The skiff in which he was riding was not engaged either directly or indirectly in interstate and foreign commerce or any commerce. There is nothing but the one element "locality" to support a conclusion that this was a maritime tort, and something more than mere locality is necessary to constitute a maritime tort.

4. The deceased employee was not working under a maritime contract at the time of the injury in the business of the employer. (Grant Smith-Porter v. Rohde, 257 U. S. 469; The Richard Winslow, 71 Fed. 426, p. 428; Ex Parte Havard (Ala.) 100 So. 897, p. 900; Eclipse Mill Co. v. Department of Labor and Industries, 251 Pac. 130; Hughes on Admiralty, 2nd ed. p. 22.

5. The admiralty courts have no jurisdtction over citizens of the same state engaged in a business which is not maritime in character, nor over citizens of the same state not engaged in a maritime business, in any action between these [fol. 110] citizens, where the rights and liabilities involved in that action are dependent upon the statutes of the state, and there is no conflict between that statute and any superior maritime law. Any jurisdiction of the admiralty courts over these parties in other matters not relating to compensation rights and liabilities, does not conflict with the sole and exclusive jurisdiction of the state courts over these

same parties at the same time in actions involving rights and liabilities under the Compensation Act.

"In the cause now under consideration, the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. *The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.*" (Underscoring ours.)

Miller's Indemnity Underwriters v. Braud, 257 U. S. 59; 46 Sup. Ct. 194.

"The Workmen's Compensation Acts the court had under consideration in these cases are no more exclusive than our own. Indeed, if there be a difference in this respect, ours is the more exclusive. *Not only is it compulsory rather than elective, but by express declaration it withdraws from private controversy and from the jurisdiction of the courts all controversies arising over the right to compensation for personal injuries received by a workman in an extrahazardous occupation.* Its exclusive features are further exemplified by the fact that it expressly declares that it is intended to apply 'to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state.' (Rem. Comp. Stat. Sec. 7674.)

"Measured by the test the authoritative court has laid down, it is our opinion that the workmen here under consideration are within the terms of the Workmen's Compensation Act, and that their employers are liable to contribute to the accident fund as required by the act. *Manifestly it seems to us, that the work in which the workmen are engaged is purely local in its nature, that it has no direct relation to commerce or navigation, and that its* [fol. 111] *regulation by the state will work no material prejudice to any characteristic feature of the general maritime law, nor interfere with the harmony or uniformity of*

that law in its international or interstate relations. **These being the circumstances, in the language of the last of the cited cases;**

'The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.' " (Underscoring ours.)

Eclipse Mill Co. v. Department of Labor and Industries, 251 Pac. 130 P. 133.

The compensation law does not conflict with any superior maritime law, for the maritime law does not prescribe any liability or relief, between employer and employee for the payment of compensation. The maritime law has no such provisions as are set forth in the Compensation Act. Without such provisions, the admiralty courts have no jurisdiction over employer and employee in actions involving compensation rights and liabilities.

"When a compensation act supersedes other state laws touching a liability for damages which depend upon the common law and state statutes, it does not come into conflict with any superior maritime law. And this is true whether the award under the act is made as upon an implied agreement or otherwise. (*Industrial Comm. v. Nordenholt Corp.*, supra, pp. 275-6.) * * * the United States Supreme Court held that application of the local law would not work material prejudice to any characteristic feature of the general maritime law. In *Grant Smith-Porter Ship Co. v. Rhode, supra*, the court held that, while the *general* admiralty jurisdiction *extends to a proceeding to recover damages* resulting from a tort committed on a vessel in process of construction when lying in navigable waters, *under the 'circumstances stated* the exclusive features of the Oregon Workmen's Compensation Act * * * would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist.' In a still more recent case, in which the record disclosed facts said by the court to be sufficient to show a maritime tort, to which the *general* admiralty jurisdiction would extend, the courts sustained an award made under the Texas State Compen-[fol. 112] **sation Act. * * * The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict**

relationship of master and servant, or employer and employee, by means of actions for damages * * * " (Underscoring ours.)

Alaska Packers Association v. Industrial Accident Commission, 73 C. D. 330, p. 331.

The State has exclusive jurisdiction over its citizens, where the status of employer and employee is shown, in compensation matters just 'as truly as it does in probate matters. In actions brought under the compensation act, the state courts have exclusive jurisdiction, for the reason that in applying the State Workmen's Compensation Act to the rights of the parties, the Commission is not applying the law maritime or state statutes which merely supplement it. The State Compensation Act is not maritime law. It does not conflict with maritime law in compensation matters. The maritime law prescribes no compensation liability or rights to thereby invoke the jurisdiction of the admiralty courts.

That this is so is emphasized by the Supreme Court of the United States, in the following language:

"The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

Miller's Ind. Underwriters v. Braud, 257 U. S. 39; 46 Sup. Ct. 194.

Without the jurisdiction of the admiralty courts being invoked, (and that cannot be, where there is no maritime law of this kind to administer), there is no conflict between the jurisdiction of the state court and the admiralty court.

In Kennerson v. Thames Towboat Co., 89 Conn., 367, the court said:

"The contract in question (i. e., of employment) may be assumed to be a maritime one. That would give the [fol. 113] admiralty court the right to take jurisdiction over it. It could not take from our court jurisdiction over a contract made in Connecticut by citizens of Conn. nor prevent its enforcement whenever it is operative by the procedure of the statute of its origin. This contract is to be interpreted and enforced by the application of the same principles accorded any contract, * * * Plainly,

this proceeding is a personal action, and not one in rem. The Admiralty Court has not exclusive jurisdiction. Knapp, Stout and Co. v. McCaffrey, 177 U. S. 638, 643; Schoonmeker v. Gilmore, 102 U. S. 118; Leon v. Galceran, 78 U. S. (11 Wall.) 185; The Belfast, 74 U. S. (7 Wall.) 624; The Hine v. Trevor, 71 U. S. (4 Wall.) 555, 567, 568; Manchester v. Massachusetts, 139 U. S. 240."

See also

Red Cross Line v. Atlantic Freight Co., 264 U. S. 109.

"The action here is not one to recover on a contract, maritime or otherwise. The liability of the employer to pay compensation to the injured employee arises from the Workmen's Compensation Act, to which Peterson and the petitioner were subject, rather than from any agreement of the parties. The law operates on the status of the parties, and affixes certain rights and obligations to that status. (North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 2, 162 Pac. 93, L. R. A. 1917E, 642.) Under the circumstances here shown to exist, application of the California Workmen's Compensation Act will not work any material prejudice to any characteristic feature of the general maritime law." (And cases cited.)

Alaska Packers Association v. Industrial Accident Commission, 73 C. D. 330, p. 332.

As stated by this Court, the action in the above cited case was not an action on a maritime contract. Though this court did not so state, we may also add the action was not one for damages on a maritime tort. In the case at bar, the action filed with the Industrial Accident Commission was neither an action in tort nor an action on a maritime contract. It was an action solely to recover compensation under the statute. (Cudahy Packing Co. v. Parramore, 263 U. S. 418, 30 A. L. R. 432, p. 535; Quong Ham Wah Co. v. Industrial Accident Commission, 184 Cal. 26.) [fol. 114] It was also an action to enforce and collect on an insurance contract made for the benefit of a third person.

"• • • *But with reference to a great variety of matters touching the rights and liabilities of persons engaged*

in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are with some exceptions, those prescribed by the State to which the vessels belong; *and it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.* In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the *liability of parties for marine torts resulting in the death of the persons injured,* we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, *it constitutes no encroachment upon the commercial power of Congress.*" (Underscoring ours.)

Sherlock v. Alling, 93 U. S. 99, p. 103.

"In conferring upon Congress the regulation of commerce, *it was never intended to cut the states off from legislating on all subjects relating to* the health, life and safety of their citizens, *though the legislation might indirectly affect the commerce of the country.* Legislation, in a great variety of ways, may affect commerce and persons engaged in without constituting a regulation of it, within the meaning of the Constitution." (Underscoring ours.)

Sherlock v. Alling, 93 U. S. 99, p. 103;
Cooley vs. Port Wardens, 12 How. 299, 320; 13 L. ed. 996, 1005;
Pacific Mail S. S. Co. vs. Joliffe, 2 Wall. 450, 459; 17 L. ed. 805, 807;
Ex Parte McNeil, 13 Wall. 236, 241, 20 L. ed. 624, 626;
Wilson vs. McNamee, 102 U. S. 572, 26 L. ed. 234;
Olson vs. Smith, 195 U. S. 332, 341, 49 L. ed. 224, 229, 25 Sup. Ct. Rep. 52;
Anderson vs. Pacific Coast S. S. Co., 225 U. S. 187, 195, 56 L. ed. 1047, 1051, 32 Sup. Ct. Rep. 625.

[fol. 115] If the facts in this case do establish jurisdiction of the Admiralty Courts, that jurisdiction is not an exclusive jurisdiction, but only a concurrent jurisdiction, which is abrogated by the exclusive features of the State statute and jurisdiction of the State courts control

Conceding for argument's sake only that the business was maritime, the contract was maritime, and the services being rendered at the time of the injury was maritime, the admiralty courts did not have exclusive jurisdiction, but, on the facts peculiar to this case, the state courts had concurrent jurisdiction. The jurisdiction of the state courts was dominant, excluding that of the admiralty courts, for the following reasons:

(1) Under the saving clause of the Judiciary Act (Secs. 24 and 256, Jud. Code), the state courts have exercised concurrent jurisdiction with the admiralty courts in practically all proceedings of an admiralty and maritime nature, except where they

(a) "contravened an applicable Act of Congress;"

(b) "attempted to authorize proceedings in rem in a state court"; and

(c) "attempted to regulate interstate or foreign commerce."

The Moses Taylor, 4 Wall. 411;
Hall v. De Cuir, 95 U. S. 485;
The J. E. Rumbell, 148 U. S. 1, 12.

"And the State courts within the limits embraced by this law exercise a concurrent jurisdiction in all cases arising within their respective territories, as particularly and independently as it is exercised by the old thirteen states (whose rivers are tidewaters), and where the admiralty jurisdiction has been in full force ever since the adoption of the Constitution."

Propeller Genesee Chief, 53 U. S. 443, 458

"* * * It may be said generally that the legislation of a State not directed against commerce or any of its regulations but relating to the rights and liabilities of citizens [fol. 116] and only indirectly and remotely affecting the

operations of commerce is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

Sherlock v. Alling, 132 U. S. 103, p. 104.

(2) The saving clause included later statutory remedies enacted by the states. (Leon v. Galceron, 11 Wall 85; Rounds v. Clover Port, 237 U. S. 303).

(3) Workmen's Compensation acts replace the common law remedies of the States. (Ind. Comm. v. Nordenholt, 259 U. S. 263, 276; Todahl v. Sudden & Christensen, 5 Fed. (2nd) 462, p. 464; Alaska Packers Association vs. Industrial Accident Commission, 73 C. D. 330).

(4) The business of the employer was not an integral part or in any way connected with or related to interstate and foreign commerce and navigation which are in the exclusive jurisdiction of the admiralty courts. It was purely a local business, non-maritime in nature, as shown by the following facts:

(A) Not that of carrying port to port commerce;

(B) Entirely local to the City of Santa Monica in its interests and operations;

(C) Not linked to, at the termination of, or in contact with any interstate or foreign railroad or steamship line, carrying interstate or foreign commerce; on the contrary, the business was entirely detached from and had nothing to do with interstate and foreign commerce;

(D) The employer and employee were citizens of the City of Santa Monica, and the State of California, and not engaged in interstate and foreign commerce, and adjudication of their rights, liabilities and interests was under the jurisdiction of the Commission exclusively, unless and until petitioner has shown facts establishing relationship with interstate and foreign commerce and navigation.

[fol. 117] **(5) The Maritime Law Affords No Remedy in Death Cases. The State Compensation Act Does. Therefore There is no Conflict with Any Maritime Law by the Application of the Local State Law in the Case at Bar.**

In the case at bar, the employee was drowned. It is a death case. The remedy sought is for an injury resulting in death. The maritime law furnishes no remedy and the state law may therefore be applied.

"* * * But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force, upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress."

Sherlock v. Alling, 93 U. S. 99, p. 103,

"Indeed, with respect to injuries that result in death, it already is settled that, although the general maritime law, like the common law, afforded no civil remedy by death for wrongful act, (The Harrisburg, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; The Alaska, 130 U. S. 201, 209, 32

L. ed. 923, 925, 9 Sup. Ct. Rep. 461,) yet a right of action created by Statute is enforceable in a state court although the tort was committed upon navigable water (American S. B. Co. vs. Chase, 16 Wall. 522, 533, 21 L. ed. 369, 372; Sherlock vs. Alling, 93 U. S. 99, 104, 23 L. ed. 819, 820,) and the liability arising out of a state statute in such a case [fol 118] will be recognized and enforced in the admiralty (The Hamilton (Old Dominion S. S. Co. vs. Gilmore), 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133), although not by proceeding in rem unless the statute expressly creates a lien; The Corsair (Barton vs. Brown), 145 U. S. 335, 347, 36 L. ed. 727, 731, 12 Sup. Ct. Rep. 949)."

A parallel situation is presented in the cases of seamen and stevedores, (the latter are now classified as seamen—International etc. v. Haverty, 47 Sup. Ct. Rep. 19). They are working under a maritime contract at the time of suffering an injury in the course of their work. The admiralty courts generally had jurisdiction over seamen and stevedores, but in tort proceedings for damages, the admiralty court is unable to assert its jurisdiction over these torts, where they occur on land. The jurisdiction of the admiralty court is limited entirely to torts occurring upon navigable waters.

The reason for this limitation to the jurisdiction of the admiralty courts is best stated by the court in State Industrial Commission of New York v. Nordenholt, 259 U. S. 263, 276:

"The stevedores' contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries *received on land*" (Underscoring ours).

And again:

"Consequently, when the compensation act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law."

See also:

Todahl vs. Sudden & Christensen, 5 Fed. (2nd) 462, p. 464.

These two decisions establish the proposition that there is no maritime or federal law to regulate the rights of maritime workers injured on land; and, therefore, the local law of the state applies and governs. Similarly, there is no dominant maritime or federal law regulating or prescribing the rights, liabilities or remedies of a maritime worker killed on navigable waters. The application of the local [fol. 119] state law, i. e., the Workmen's Compensation Act, in the case at bar, therefore, does not contravene any applicable act of Congress; does not come into conflict with any superior maritime law, and the state court has jurisdiction under the circumstances and facts found in the present case. This is established definitely in a death case, essentially local in character, as follows:

"The Act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

Miller's Indemnity Underwriters vs. Braud, 257 U. S. 59, 46 Sup. Ct. Rep. 194.

The Braud Case just cited is the one particularly relied upon by this Court in this State, in rendering the decisions in the Paul Case, City of Oakland, v. Industrial Accident Commission, 198 Cal. 273, and the Peterson Case, Alaska Packers Association v. Industrial Accident Commission, 73 C. D. 330.

In the case at bar, assertion of jurisdiction by the state courts and application of the provisions of the Workmen's Compensation Act, do not conflict with any superior maritime law, for there is no superior maritime law in death cases to come into conflict with; nor does it disturb the uniformity of the law maritime. The Workmen's Compensation Act furnishes the only remedy in any court or under any law to meet the rights of the dependents of the deceased employee Brooke.

III

Answering Petitioner's Contentions

Petitioner's whole argument with the District Court of Appeal was based upon the opinion of the United States

Supreme Court, as expressed in the matter of Southern Pacific Company v. Jensen, 244 U. S. 205, where Mr. Justice McReynolds said:

[fol. 120] "* * * The remedy which the compensation statute attempts to give is of a character wholly unknown to the common-law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

Compare the foregoing language of Mr. Justice McReynolds in the Jensen case with the language of this same Justice in a later decision, i. e., the Nordenholt case, wherein he says:

"Consequently when the compensation act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law."

This decision by Mr. Justice McReynolds in the Jensen Case was a startling decision, for prior to that time it had been assumed that state workmen's compensation acts would apply to any fatal maritime injury, as the federal law maritime had no provision for fatal injuries. (See No. Pacific Co. vs. Industrial Accident Commission, 174 Cal. 346). That the Supreme Court of the United States did not intend to promulgate or at least to abide by the doctrine of law as hereinabove quoted in the Jensen Case is evidenced by the history of the decisions handed down by that court thereafter. This is most strongly evidenced by the language of the District Court (S. D. Texas), 15 Fed. Rep. (2nd) 54, where the court says:

"While on the general proposition my view of the matter is that expressed by Mr. Justice Brandeis in his dissenting opinion in *Washington v. Dawson*, 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646, especially in that part of it which constitutes a most admirable contribution to the science of the law, beginning at page 235 of 264 U. S. (44 S. Ct. 302) to the end, and so feeling I would let my mind be bold to find an exception here, it is not necessary for me to do, *for the Supreme Court of the United States, in its slow but inevitable back trek* has already made the exception in re-

fusing writ of certiorari (46 S. Ct. 353) in *Southern Surety Co. v. Crawford* (Tex. Civ. App.) 274 S. W. 280, and in affirming the Supreme Court of Texas in *Miller's Indemnity Underwriters vs. Braud*, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. —, 1926 A. M. C. 310 * * * ." (Underscoring ours).

[fol. 121] This "inevitable back trek," referred to in the decision just cited, starts with the decision of the United States Supreme Court in Western Fuel, etc. v. Garcia, 257 U. S. 233, decided in October, 1921, where a maritime worker was killed on board a vessel and the court said:

"It is an established doctrine that no suit to recover damages for the death of a human being caused by negligence may be maintained in the admiralty courts of the United States under the general maritime law. * * * The subject is maritime and local in character and the specified modification or supplement to the rule applied in admiralty courts when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

In the same Term (October 1921) the United States Supreme Court in Grant Smith-Porter Ship Co. vs. Rohde, 257 U. S. 469, noted a further exception to the rule laid down in the Jensen Case. An employee was injured while working upon an uncompleted vessel on navigable waters, and the provisions of the Workmen's Compensation Act were applied, because the work was not being done under a maritime contract, though it was a maritime service occurring upon navigable waters. The court said:

"Their rights and liabilities had no direct relation to navigation and the application of the local law can not materially affect any rules of the sea whose uniformity is essential."

In the next decision (October, 1922), the United States Supreme Court announced a further re-statement of the rule found in the Jensen case, in their decision rendered in

Great Lakes etc. Co. vs. Kerejewski, 261 U. S. 479. Kerejewski received injuries upon navigable faters, causing his death. The Court said, at page 480:

"While performing maritime service to a completed vessel afloat, he came to his death upon navigable waters as the result of a tort there committed. The rules of the mari- [fol. 122] time law supplemented by the local death statute applied to fix the rights and liabilities of the parties. (Western Fuel Co. vs. Garcia, 257 U. S. 233."

The next decision by Mr. Justice McReynolds of the United States Supreme Court is found in the matter of State Industrial Commission of New York v. Nordenholt, 259 U. S. 263, which decision has been heretofore analyzed and discussed, and which particularly holds at page 276:

"Consequently, when the Compensation Act superseded other state laws touching the liability in question, it did not come into conflict with any superior maritime law."

The last decision by the United States Supreme Court on this point is that of Miller's Indemnity Underwriters v. Braud et al, 257 U. S. 59, 46 Sup. Ct. Rep. 194, (see page 195), decided in February, 1926. By this decision the United States Supreme Court has still further receded from the position taken in the Jensen case, has promulgated the rule now followed by this Court in the Paul case and in the Peterson case, supra.

The rule therefore is now that the application of state workmen's compensation acts to maritime injuries or to injuries occurring upon navigable waters is forbidden only where the application would interfere with the characteristic harmony and uniformity of that law in its interstate and international aspects.

Where the Subject-matter is Local in Character and the Application of the Local Law does not Conflict with the Maritime Law and Would Not Defeat the Uniformity Aimed at by the Constitution in Matters of Interstate and

Foreign Commerce, the Local Law May Be Applied in the State Courts or Commissions

That this is the true rule is particularly emphasized by the different Supreme Courts in the various states.

[fol. 123] Los Angeles Shipbuilding & Drydock Corp. vs. Industrial Acc. Com., 57 Cal. App. 352, 792;
Southern Surety Co. vs. Crawford, 274 S. W. 280;
Ex Parte Havard, 100 So. 897;
Miller's Ind. Underwriters Co. vs. Bourdreaux, 245 S. W. 1025, 261 S. W. 137;
Maddern vs. Fox Film Co., 200 N. Y. S. 344, 143 N. E. 764;
McBride vs. Standard Oil Co., 188 N. Y. S. 90;
Wildfeuer vs. Miller & Gold, 188 N. Y. S. 81.

In the case of Ex parte Havard, 100 So. 897, the Court says:

"Here the contract is not of a maritime nature; * * * so, also, in the instant case, the employer was engaged in the business of running a planing mill and lumber yard; *certainly a non-maritime business.*" (Underscoring ours.)

In a very recent decision, *Eclipse Mill Co. vs. Department of Labor and Industries*, 251 Pac. 130, the Supreme Court of Washington lays down the rule that where

"neither the employment nor the activities of the employee or those of his employer HAVE ANY DIRECT RELATION TO NAVIGATION AND COMMERCE IN ITS INTERNATIONAL AND INTERSTATE ASPECTS, the assertion of jurisdiction over the parties by the state courts will not be disturbed in compensation matters." (Capitals ours.)

Conclusion

In the decision just rendered by the District Court of Appeal in this matter, the Court correctly states the true rule to be as follows:

"The rationale of these decisions being founded on the necessity of preserving unimpaired the harmony and uni-

formity of the characteristic features of maritime law, *some mitigation of the rigor of the rule has been deemed permissible, in a limited class of cases*, where the matter is one of mere local concern and the enforcement of the local enactments will work no material prejudice to maritime rules in general. * * *" (Underscoring ours.)

[fol. 124] It is our contention that the District Court of Appeal has failed to approach the question presented in this proceeding with the proper attitude and conception of the effect of the Workmen's Compensation Act and has inadvertently misapplied the hereinabove quoted rule as stated by that Court to the facts in the case at bar.

We therefore respectfully petition this Court to grant the hearing in this matter to the end that the apparent conflict between this decision as rendered by the District Court of Appeal with the decisions of this Court in the Paul and Peterson cases, supra, may be dissolved. The necessity for an harmonious application of the doctrines laid down by this Court in the Paul and Peterson cases, supra, in future decisions is of tremendous importance to this Commission in the administration of the Workmen's Compensation Act and unless the apparent lack of harmony now created by this recent decision of the District Court of Appeal be removed, the Commission will undoubtedly be confused and hampered in future cases.

Respectfully submitted.

G. C. Faulkner, Counsel for Respondent Industrial Accident Commission.

[fol. 125] EXHIBIT TO PETITION FOR HEARING

IN THE DISTRICT COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO

Civ. 5532

LONDON GUARANTEE AND ACCIDENT COMPANY, LTD., Petitioner,

vs.

THE INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF California, Sarah Jane Brooke, and John Arthur Brooke, Respondents

On Petition for Writ of Review

For Petitioner: E. R. Young, H. R. Kelly, E. L. Williams.
For Respondent Commission: G. C. Faulkner.

This is a proceeding in certiorari to review an award of the Industrial Accident Commission for payment of $150 for the burial expenses of John James Uttley Brooke, an unmarried minor nineteen years of age, who was drowned in Santa Monica Bay on April 8, 1926, while in the service of the Morris Pleasure Fishing, Inc. The petitioner was the insurance carrier of the employer; and the question presented is whether the case must be relegated to the exclusive cognizance of a court of admiralty, or may be brought within the purview of the Workmen's Compensation Act of this state.

On a petition to the Industrial Accident Commission filed by the mother and the stepfather of the deceased, hearings were had on June 10 and September 13, 1926 before the [fol. 126] Commission, which on October 6th made its findings that Brooke, while employed as a spare skipper, met his death by drowning in an accident occurring in the course of, and arising out of, his employment; that he was not at the time engaged in maritime employment; and that both he and his employer were subject to the provisions of the Workmen's Compensation Act. The Commission further found that neither the mother nor the stepfather of the deceased was dependent upon him; and accordingly the

award was limited to the reasonable expenses of burial, which were fixed at $150. Application for a rehearing was filed by the employer; and its insurance carrier, which was, however, denied.

The evidence taken at the hearings showed the facts to be as follows. The Morris Pleasure Fishing, Inc., is a corporation which carries on the business of maintaining and operating from Santa Monica Bay a small fleet of fishing vessels, for the accommodation of the public seeking recreation in deep-sea fishing. In the fishing seasons its practice has been to have excursions daily from Santa Monica Bay to the ocean fishing grounds, a distance of three to five miles, with fixed charges both for half-day and full-day trips. For use in this business the company has several vessels, ranging from four to fourteen tons registry, equipped with gas engines and capable of cruising a distance of 500 miles. The business has been confined entirely to the maintenance of these pleasure-fishing vessels and the transportation of patrons to and fro by water, except that excursionists have also been supplied with bait. As one of the necessary incidents of its business the company employs seamen to navigate its vesels; and before and at the time of the accident which occasioned Brooke's death, he was in the company's employ as an apprentice navigator and seaman. In the capacity he made daily trips as required with the Company's vessels, and at times substituted as "spare skipper" for one of the regular skippers. On April 8, 1926, one of the company's fishing vessels called "W. K.," of about seven tons registry, was moored, with [fol. 127] no one aboard, in Santa Monica Bay about three-quarters of a mile to a mile from the pier. A storm having arisen, the vessel broke from her moorings early in the afternoon, and began to drift toward the shore. In an effort to save the vessel from destruction, Captain Morris, as Brooke's superior officer, had Brooke and another employee, named Gregory, put off from the pier with the captain himself, in a boat about eighteen feet long, with the purpose in mind of boarding the "W. K." and returning her to her anchorage. But as they neared the drifting vessel, their boat was capsized by a heavy wave and all three were drowned.

The petitioner here contends that Brooke's employer was engaged exclusively in a maritime industry; that its contract with Brooke was for maritime services alone; and that Brooke's life having been lost in such service in navigable waters of the United States, the rights and liabilities of the parties are to be determined by the general maritime law, and hence there was no jurisdiction in the Industrial Accident Commission to conduct any hearing or to grant any award.

The Commission does not dispute the fact that the casualty occurred in navigable waters; but it contends that as the business of the employer was a pleasure business, there was not a maritime contract touching rights and duties pertaining to commerce or navigation in a way to invoke the rules of maritime law and exclude the case from the juridical competency of the state tribunals, and that the matter is one merely of local concern. In this connection it is argued that federal jurisdiction is not broadly conferred by reason of the navigability of waters, but is limited to a regulation of interstate and foreign commerce, in consequence of which admiralty takes cognizance only of these maritime controversies which have a commercial nexus, and that the exercises of its powers is conditioned upon the synthesis of navigable ships, engagement in commerce and the law of the sea.

[fol. 128] It is not essential, however, that for the purpose of admiralty jurisdiction a vessel should be in commercial service. In Reppert v. Robinson, 20 Fed. Cas. No. 11703, it was said by Judge Taney: "The manner in which a vessel is actually employed cannot affect the question of jurisdiction. It depends upon her character; and it does not rest with the owner to confer or take away the admiralty jurisdiction, at his pleasure, by the mode or trade in which he afterwards employs her." And in the General Cass, 1 Brown Adm. 334 (10 Fed. Cas. No. 5307), the rule is thus stated: "The true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity or means of propulsion."

The fishing vessels of the Morris Pleasure Fishing, Inc., were capable of going out to deep waters of the Pacific Ocean, and their equipment was sufficient for a cruise of as much as 500 miles on occasions. They were therefore vessels within the definition given in section 3 of the United States Revised Statutes, which reads: "The word 'vessel' includes every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water." This statutory definition is construed in Charles Barnes Co. v. One Dredge Boat, 169 Fed. 895, 896, to include "a navigable structure capable of being used for transportation, whether intended to be, or actually, used for that purpose." In the case of these fishing boats, there was in the season a regular service, and each voyage had a place of origin and a place of destination, though the termini may not have been geographically constant. Since the ships did actually convey passengers to and fro between the anchorage in Santa Monica Bay and the deep-sea fishing banks, they were not only capable of use, but were in real use, as vehicles of nautical transportation; and while performing their service to pa- [fol. 129] trons they were in fact engaged in commerce upon navigable waters. For the transportation of persons, even on short excursions, is commerce. (The City of Pittsburg, 45 Fed. 699, 702. County of Mobile v. Kimbell, 102 U. S. 695, 702.)

It is true the vessels did not engage in the carriage of goods or passengers between fixed ports; but their use for purposes of recreation, sport or pleasure did not detract from the character of the craft. In the case of W. W. Brown, 46 Fed. 290, a former ferry-boat, propelling a floating circus from place to place on the Mississippi river for exhibition purposes, was held to be in maritime service. In like manner a dismantled steamboat converted into a pleasure barge without independent means of propulsion, and used, when towed, for picnics and excursion parties, was pronounced in the City of Pittsburg 45 Fed. 699 to be a vessel subject to the maritime law. Again, in Reinhardt v. Newport Flying Service Corporation, 232 N. Y. 115, 133 N. E. 371, a hydro-aeroplane, though not utilized commercially, was declared, when in the water as a seaplane, to be stamped by location and function as a means of water transporta-

tion, notwithstanding that while in the air it would possess no such character. And in the Public Bath No. 13, 61 Fed. 692, where a structure built on a float not permanently moored, and used as a transportable municipal bathhouse, had been swept adrift in a storm, Judge Brown, who was exceptionally well versed in admiralty law, in awarding salvage for the rescue of the contrivance, declared that use in trade and commerce was not essential to salvage, and remarked that if that were material, there would be no salvage allowed upon yachts and other water-craft for pleasure, which, he said, would be absurd.

It is thus not the use to which a craft is being put in navigable waters that fixes its status, but the use to which it is capable of being put; and there can be no doubt that [fol. 130] the vessel- owned by Brooke's employer were of a character, and in a service, rendering them amendable to the process of admiralty.

In the present case there is no charge of any delictual omission or commission. The death was due to a casualty occurring in navigable waters, and the accident, which was due to a peril of the sea, was one arising out of, and in the course of, Brooke's employment. The award of the Commission is thus not predicated on any tort, but is based on the theory that the indemnification provided by the local statute became a legal incident of the relationship created by the contract of employment. The real test of jurisdiction, however, must be found in the nature of the employment itself. If the deceased met his death while performing maritime service under a maritime contract, then, according to the rule promulgated by the United States Supreme Court, neither his contract nor the rights and liabilities growing out of it could be affected by any local statute of indemnification for injury or death. To ascertain the character of the contract we must look to its subject matter, and determine the nature and class of service which Brooke was required to render.

(State Ind. Com. v. Nordenholt Corp., 259 U. S. 263.)

A maritime contract for personal service must relate to the reparation or betterment of a vessel in aid of navigation, or to an employment directly connected with the propulsion or navigation of a ship capable of use in commerce,

or tending to enable the ship to discharge its maritime duty. (Gurney v. Crockett, 11 Fed. Cas. No. 5874.) The services which Brooke was employed to perform were not those of a landsman. He was a spare skipper, and was generally employed aboard ship in operative navigation, his labor contributing to the accomplishment of the ship's voyage. A vessel and its crew are considered a unit, whatever may be the stations of the respective members; and under Brooke's general employment he was to be classed as a seaman or mariner. On the fatal occasion he was called by his employer to assist in a maritime exigency, and to lend aid in preserving one of his employer's navigable ves- [fol. 131] sels from a marine peril. He thus went to his death in navigable waters in the performance of a service peculiarly maritime; and the casualty was incontestably a maritime accident occurring in the performance of duty. The finding of the Commission that Brooke was not at the time engaged in maritime employment is contrary to the evidence; and we thus face the question whether under the facts of the case the local law of California may have accorded to it primacy over the law of the sea.

The rule by which we must be guided has been enunciated by the United States Supreme Court in Southern Pacific Co. v. Jensen, 244 U. S. 645. Though in that case there was vigorous dissent on the part of some members of the court, and the decision has not in general had a hospitable reception, yet, through reiteration in subsequent cases, the principle of the Jensen case has been so firmly established that it must serve as the norm for resolving jurisdictional conflicts between courts of admiralty and tribunals deriving their powers under the compensation laws of the states. Under the doctrine promulgated by the august court whose arbitrament is final, when one employed in work at sea under a maritime contract directly affecting navigation or commerce receives a maritime injury, or suffers death through a maritime casualty, the ensuing rights and liabilities are dependent, under the Constitution, upon the general principles of maritime law, operating uniformly throughout the broad expanse of the nation by virtue of the grant to the federal courts of "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." Hence any local legislation which would be destruc-

tive of that uniformity is, to the extent of the conflict, unconstitutional, since it must tend to hamper and impede freedom of navigation between the states and with foreign countries. The Central thought of the decision is thus expressed: "And plainly, we think no such legislation is valid [fol. 132] if it contravenes the essential purpose expressed by an act of congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequences would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

So in the Jensen case the New York Compensation Act was held unavailable to the dependents of an employee killed by injury received aboard ship while performing the work of a stevedore in unloading cargo. The same rule was applied in Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, where a fireman on board a steamship, while performing duties on deck during a storm, received injuries necessitating amputation of his leg. Again, in Robins Dry-dock & Repair Co. v. Dahl, 266 U. S. 449, a workman making repairs for the betterment of a vessel lying in navigable waters was precipitated into the hold by the breaking of a defective scaffold, and brought suit in the state court of New York to recover damages for injuries sustained by reason of his employer's negligence. It was held that since the work directly related to navigation and commerce, the rights and liabilities of the parties depended on general maritime law, and could not be altered or impaired by a state statute prescribing the duty of the employer relative to providing scaffolding such as to give proper protection to workmen. Accordingly an instruction that the jury might consider the local law in determining whether or not the employer was negligent was pronounced erroneous, and the judgment in favor of the employee was reversed.

[fol. 133] In Knickerbocker Ice Co. v. Steward, 253 U. S. 149, a bargeman, while doing work of a maritime nature, fell into the Hudson River and was drowned. This case presented for consideration the amendment of October 6, 1917, to the Judicial Code attempting to make compensation statutes applicable to maritime injuries. But the Court, holding such attempt to be ineffectual and reaffirming the rule of the Jensen case as to the dominance of the general maritime law, said (p. 164): "Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended, or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it, to be dealt with according to its discretion—not for delegation to others. To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established—It would defeat the very purpose of the grant."

The rule so declared applies not only to cases of personal injury suffered in a maritime employment directly affecting navigation or commerce, but also to cases arising out of a breach of maritime contract. In Union Fish Co. v. Erickson, 248 U. S. 308, there was an oral contract made with Erickson in California to proceed to Alaska, and after arrival there to serve for a year as master of a vessel at an agreed compensation. He was discharged, however, before the expiration of the term of his employment, and thereupon filed in admiralty a libel in rem for damages for breach of his contract. One of the defenses was that the contract, being oral, was invalid under section 1624 of the [fol. 134] Civil Code of California, the state in which the contract was made. In this case, as in the Jensen case, the employment was held to have been in contemplation of the recognized principles of admiralty law, which no state law can be permitted to infringe or defeat. Accordingly, the defense based on the statute of frauds of California was declared to be untenable.

The rationale of these decisions being founded on the necessity of preserving unimpaired the harmony and uniformity of the characteristic features of maritime law, some mitigation of the rigor of the rule has been deemed permissible, in a limited class of cases, where the matter is one of mere local concern and the enforcement of the local enactments will work no material prejudice to maritime rules in general. A broad line of demarcation is thus drawn between rights and liabilities existing under employments having direct relation to navigation and commerce, and those arising under contracts of a non-maritime character. In Grant Smith-Porter Co. v. Rohde, 257 U. S. 469, a carpenter was injured while engaged in work on an uncompleted vessel lying in navigable waters; and both employer and employee having treated the compensation law of Oregon as governing their relations, and the contract being non-maritime, it was deemed that no prejudice to the general maritime law would result by letting the rights and liabilities of the parties be adjudged in accordance with the local statute.

Not only is there this well defined distinction between cases arising under maritime contracts and those in which the contracts are non-maritime, but even where the contracts are maritime, cases in which injuries occur on land may have different treatment from those in which the injuries are suffered at sea. Thus in State Ind. Com. v. Nordenholt Corp., 259 U. S. 263, a longshoreman was mortally injured while working on the dock, and aiding in the discharge of a cargo of cement from a vessel lying alongside. [fol. 135] The court there said (p. 272): "When an employee working on board a vessel in navigable waters sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of the employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty

jurisdiction; but not so when the accident occurs on land." After reviewing the Jensen case and others already cited, the court in conclusion expressed itself as follows (p. 276): "The stevedore' contract of employment did not contemplate any dominant Federal rule concerning the master's liability for personal injuries received on land. In Jensen's case, rights and liabilities were definitely fixed by maritime rules, whose uniformity was essential. With these the local law came into conflict. Here no such antagonism exists. There is no pertinent Federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law."

Another instance of the application of the local law is afforded when death occurs in consequence of a maritime tort committed within the territorial limits of a state where a statute affords a right of action for damages. A case of this character is exemplified in Western Fuel Co. v. Garcia, 257 U. S. 233. In that case a stevedore was killed while at work in the hold of a vessel discharging cargo in San Francisco bay. A suit in personam, based on allegations of negligence, was instituted in admiralty by the heirs of the deceased; but, the suit having been begun more than one year after the accident, the question arose whether the state statute of limitations could be interposed as a bar. It was held that inasmuch as the alleged tort had been committed on navigable waters, admiralty could entertain juris-[fol. 136] diction; but nevertheless the right of action for a wrong committed within the territorial limits of the state was so far local in character as to be brought within the purview of the state statute without prejudice to the rule of uniformity, and hence the right to maintain the suit was subject to the bar of the local statute. The view that in a suit in admiralty to recover damages for death due to a maritime tort committed on navigable waters of a state, the rules of maritime law may be supplemented by the local death statute is reaffirmed in Great Lakes Dredge & Dock Co. v. Kierajewski, 261 U. S. 479.

Still another case of local concern is exhibited in Miller's Indemnity Underwriters v. Braud, 270 U. S. 59, in which, under the name of Miller's Indemnity Underwriters v. Bourdeaux, there had previously been a decision

by the Supreme Court of Texas, reported in 261 S. W. 137. There a diver employed by a shipbuilding company submerged himself from a small floating barge or pontoon at anchor in a navigable river 35 feet from the shore, to saw off timbers of an abandoned set of ways once used for launching ships and which had become an obstruction to navigation. The Texas court states that he was not engaged in work upon or connected with the barge, and could not be considered a seaman. While he was at work on the submarine timbers, his air supply was in some way cut off and he was suffocated. Though the death occurred through a maritime tort, yet the work of this diver was not so directly connected with navigation and commerce as to fall exclusively within maritime jurisdiction; and since the state statute of Texas prescribed the only remedy that could be had, it was held that its exclusive feature superseded the right to resort to admiralty which would otherwise have existed.

An instructive contrast with this decision is furnished by a case possessing certain distinguishing features, which had [fol. 137] previously arisen in New York—De Gastano v. Merritt & Chapman Dock & Wrecking Co., 196 N. Y. S. 573. In this case the diver was one of the regular crew of a vessel engaged at the time in laying a submarine cable, and was at work on the sea floor in the very service in which the vessel was being employed. He was therefore a seaman attached to the vessel and engaged at work intimately connected with its operation. Upon that ground the New York court held that the State Compensation Law was not applicable.

The law as proclaimed in the cases cited has been applied, with regard paid to its distinctions, by the appellate courts of this state in several cases which have engaged their attention. The first case decided by our supreme court after the decision in the Jensen case was Tallac Co. v. Pillsbury, 176 Cal. 236, where a mate, hired in San Francisco for a voyage to British Columbia, was injured on board the plaintiff's steamer while loading cargo in the port of New Westminister. Upon the return of the ship to San Francisco, the Industrial Accident Commission, on application of the injured seaman, made an award in his favor under the Workmen's Compensation Act; but upon

certiorari the award was annulled upon the ground that the Commission was wholly without jurisdiction.

In Sudden & Christensen v. Industrial Acc. Com., 182 Cal. 437, the court was called upon to review an award of death benefits to the dependants of a stevedore, killed while working on the deck of a lumber vessel discharging cargo at her dock. Here again the court, following the Jensen case, declared that the award of the Commission was an invasion of the exclusive jurisdiction of admiralty.

In Alaska Packers Assn. v. Industrial Acc. Com., 191 Cal. 763, a seaman was injured while working as a rigger on board a bark at her dock in the Oakland estuary, where she was being made ready for her next voyage. Quoting pertinent portions of the opinions in State Ind. Com. v. [fol. 138] Nordenholt Corp., 259 U. S. 263, and Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U. S. 479, the court denied jurisdiction to the Industrial Accident Commission and annulled the award.

A like conclusion was reached in Zurick General Accident & L. E. Co. v. Industrial Acc. Com., 191 Cal. 770, which in its circumstances is not dissimilar to the case at bar. There an award had been made to the dependants of a deckhand employed on a dredger at Newport harbor, who was drowned in attempting to go ashore in a motor launch upon an errand connected with his employment. After a survey of the authorities, the court held that the employment was so directly connected with navigation and commerce as to require the application of the rule of the Jensen case in the interest of uniformity; and again the award of the Commission was annulled.

James Rolph Co. v. Industrial Acc. Com., 192 Cal. 398 (affirmed 264 U. S. 219), is another case in which the death of a stevedore occurred by reason of injuries received while working on a vessel discharging cargo at her dock. The court emphasized the distinction made in State Ind. Com. v. Nordenholt Corporation between work aboard ship and work ashore; and held that the Commission acted in excess of its jurisdiction, and hence its award could not be sustained.

In Beyerle v. Industrial Acc. Com., 48 Cal. App. Dec. 439, 241 Pac. 894, injury was suffered in the waters of San Diego Bay by an employee of a lumber company, whose employment required him to aid not only in the operation

of a motor boat used in towing, but also in work on rafts of logs lying at anchor. In this case the Industrial Accident Commission had denied compensation; and upon certiorari the order was affirmed upon the ground that the injury having occurred in navigable waters and in a maritime employment, the case was within the exclusive jurisdiction of admiralty.

Thus whenever a case has been presented in which injury [fol. 139] has been accidentally suffered in navigable waters or on board a completed ship by one engaged in maritime employment directly affecting navigation or commerce, our appellate courts have consistently maintained the exclusiveness of the admiralty jurisdiction. On the other hand, certain cases have arisen in which the circumstances have been such as to bring the cases within an exception to the general rule. In Los Angeles Shipbuilding & Drydock Co. v. Industrial Acc. Com., 57 Cal. App. 372, 241 Pac. 894, a marine machinist was injured while installing machinery in a vessel which had been launched, but was still under construction. The vessel being uncompleted, the employment was held to be of a non-maritime character, as in Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469; and the injury was therefore adjudged compensable under the state law.

In City of Oakland v. Industrial Acc. Com. 198 Cal. 273, a civil service employee of the municipality was serving as a deck hand on a scow used as a tender to a municipal dredger operated by the city in deepening the channel of the Oakland estuary. The scow was tied to the wharf at the time, waiting to be towed to some point in the channel; and the employee was injured while cutting wood for a boiler on board. The supreme court held that there was nothing in the facts of this case indicating that either the general employment in the civil service, or the activities of the employee at the time of the injury had any direct relation to navigation or commerce; and hence the matter was one of more local concern, wherein the maritime rules might properly yield to state regulations. The award of the Commission was therefore affirmed.

The latest case from our supreme court is Alaska Packers Assn. v. Industrial Acc. Com., 73 Cal. Dec. 330, 253 Pac. 926. In this case, an employee named Peterson, who had entered into a contract in San Francisco to render services as a

seaman and fisherman for the fishing season in Alaska, [fol. 140] was injured at the close of the season in work incident to the storage of fishing boats for the winter. He and a fellow employee had temporarily left their boat at anchor near the beach; and on returning found that because of the low tide the boat had become stranded in the mud and sand, though for the most part still in water. Standing on the bank, Peterson attempted with the aid of others to lift the boat sufficiently to float it, but in doing so suffered injury to his back and hip. The Industrial Accident Commission awarded compensation; and in considering the question of jurisdiction the supreme court, while pronouncing the contract to be of a maritime nature, laid stress on the fact that the injury occurred while Peterson was standing on the beach; and took the view that his activity in pushing and lifting the boat was essentially land-labor and not maritime in character. The case was therefore placed in the category of those involving injuries sustained on land by dock and port employees working under maritime contracts, which may be governed by the local law without prejudice to the characteristic feature of admiralty.

It can hardly be said that the body of judicial decisions is sufficiently diversified as yet to permit any broad generalization definitive of the class called cases of local concern. The law of the subject is still in a formative stage, and intervening between the dominant maritime class and the territorial class is a twilight zone which will doubtless narrow, little by little, as the marginal lines become more sharply delimited under the process of judicial paring. At present we may, however, make certain general deductions from the decisions of authoritative rank.

When a maritime injury occurs in navigable waters to one engaged in distinctive maritime work under a contract directly affecting navigation or commerce, the necessity of preserving the freedom of interstate and international navigation and commerce commits the case to the exclusive ju- [fol. 141] risdiction of admiralty. Under such circumstances the maritime jurisdiction is established by the conjunction of the locus of the accident and the nature of the employment. When, however, such concurence is wanting, the rule of uniformity may be relaxed, where the circumstances permit relief to be advantageously afforded by the local law

without conflict with the tribunals of the sea. And particularly is this course allowable when the work, though performed on navigable waters, is under a non-maritime contract; and likewise when, though the employment is maritime, the locus of the accident is so related to the territorial jurisdiction that antagonism will not be bred by according paramountcy to the local law rather than to the general maritime law as administered in admiralty.

In the present case there does exist the concurrence of maritime locus and maritime work under a maritime contract, which, in the interests of uniformity, renders the State Compensation Act inoperative. Brooke, under his employment as a seaman attached to navigable vessels, lost his life in navigable waters while engaged in an effort to save one of his employer's vessels from a peril of the sea. His contract of employment as a mariner contemplated submission to the dominant federal rule in all such perilous undertakings; and whenever under such circumstances casualties of that character occur, the attendant rights and liabilities are to be determined by the same general law, whether the place of the fatality is in the Bay of Santa Monica, or of San Francisco, or New York, or in the Gulf of Mexico, or in mid ocean. The controlling principle is aptly illustrated in the rather unique case of Reinhardt v. Newport Flying Service Corp., 232 N. Y. 116, 133 N. E. 371. There a hydro-æroplane, while moored in the navigable waters of Grauvesend Bay, dragged its anchor and was drifting toward the beach in danger of being wrecked. The plaintiff, who was employed in the care and management of the craft, waded into the water to turn the plane about, [fol. 142] and was injured by the propeller. Compensation was awarded him by the New York Industrial Accident Commission; but the Court of Appeals, holding both the employment and the injury to be maritime, asserted the supremacy of the general maritime law, and, reversing the award, dismissed the claim.

A similar disposition must be made of the case at bar, which possessing no affinity with cases of mere local concern, must take its place in the realm over which admiralty reigns supreme.

The award is annulled.

Johnson, J., pro Tem.

We concur: Works, P. J. Thompson, J.

[fol. 143] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER ALLOWING PETITION FOR HEARING—Filed July 25, 1927

Respondent's application to have the above entitled matter heard and determined by this court after judgment in the District Court of Appeal of the Second Appellate District, Division Two, is granted and said matter transferred to this court for hearing and decision.

Dated July 25, 1927.

Waste, C. J., Seawell, J., Shenk, J., Curtis, J., Langdon, J., Preston, J.

[File endorsement omitted.]

[fols. 144-149] IN SUPREME COURT OF CALIFORNIA

ORDER SETTING CAUSE—Aug. 11, 1927

By the COURT:

The following cases are hereby placed upon the calendar of the Supreme Court for hearing at Los Angeles, California, Sun Finance Building, on September 12, 13 and 14th, 1927:

* * * * * * *

Wednesday, September 14, 1927—10:00 A. M., L. A. 9991, London Guarantee & Accident Co. vs. I. A. C.

* * * * * * *

Seawell, Acting C. J.

Dated August 11, 1927.

[fol. 150] IN SUPREME COURT OF CALIFORNIA, IN BANK

L. A. No. 9991

LONDON GUARANTEE & ACC. CO.

vs.

IND. ACC. COMM.

ORDER OF SUBMISSION—Filed Dec. 15, 1927

By the COURT:

The time for filing briefs pursuant to an order entered herein September 14, 1927, having expired, matter (review) submitted as of this date.

Waste, Chief Justice.

Dated December 15, 1927.

[File endorsement omitted.]

[fol. 151] IN SUPREME COURT OF CALIFORNIA

L. A. 9991

LONDON GUAR. & ACC. CO.

vs.

IND. ACC. COMM.

JUDGMENT—March 27, 1928

Award of the Industrial Accident Commission is affirmed.

Langdon, J.

We concur: Shenk, J., Waste, C. J., Curtis, J., Seawell, J., Richards, J., Preston, J.

[fol. 152] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA, BANK

L. A. 9991

[Title omitted]

OPINION—Filed March 27, 1928

This is a proceeding in certiorari to review an award of the Industrial Accident Commission for payment of $150 for the burial expenses of John James Uttley Brooke, an unmarried minor nineteen years of age, who was drowned in Santa Monica Bay on April 8, 1926, while in the service of the Morris Pleasure Fishing, Inc. The petitioner was the insurance carrier of the employer; and the question presented is whether the case must be relegated to the exclusive cognizance of a court of admiralty, or may be brought within the purview of the Workmen's Compensation Act of this state.

On a petition to the Industrial Accident Commission filed by the mother and the stepfather of the deceased, hearings were had and findings made that Brooke, while employed as [fol. 153] a spare skipper, met his death by drowning in an accident occurring in the course of, and arising out of, his employment; that he was not at the time engaged in maritime employment; and that both he and his employer were subject to the provisions of the Workmen's Compensation Act. The Commission further found that neither the mother nor the stepfather of the deceased was dependent upon him; and, accordingly, the award was limited to the reasonable expenses of burial, which were fixed at $150.

The evidence taken at the hearing showed the facts to be as follows: The Morris Pleasure Fishing, Inc., is a corporation which carries on the business of maintaining and operating from Santa Monica Bay a small fleet of fishing vessels for the accommodation of the public seeking recreation in deep-sea fishing. In the fishing seasons its practice has been to have excursions daily from Santa Monica Bay to the ocean fishing grounds, a distance of three to five miles, with fixed charges both for half-day and full-day trips. For use in this business the company has several

vessels, ranging from four to fourteen tons registry, equipped with gas engines and capable of cruising a distance of 500 miles. The business has been confined entirely to the maintenance of these pleasure-fishing vessels and the transportation of patrons to and fro by water, except that excursionists have also been supplied with bait. As one of the necessary incidents of its business the company employs seamen to navigate its vessels; and before and at the time of the accident which occasioned Brooke's death, he was in the company's employ as an apprentice navigator and seaman. In that capacity he made daily trips as required with the Company's vessels, and at times substituted as "spare skipper" for one of the regular skippers. On April 8, 1926, one of the company's fishing vessels called "W. K.," of about seven tons registry, was moored, with no one aboard, in Santa Monica Bay about three-quarters of a mile to a mile from the pier. A storm [fol. 154] having arisen, the vessel broke from her moorings early in the afternoon, and began to drift toward the shore. In an effort to save the vessel from destruction, Captain Morris, as Brooke's superior officer, had Brooke and another employe, named Gregory, put off from the pier with the purpose in mind of boarding the "W. K." and returning her to her anchorage. But as they neared the drifting vessel, their boat was capsized by a heavy wave and all three were drowned.

The petitioner here contends that Brooke's employer was engaged exclusively in a maritime industry; that its contract with Brooke was for maritime services alone; and that Brooke's life having been lost in such service in navigable waters of the United States, the rights and liabilities of the parties are to be determined by the general maritime law, and hence there was no jurisdiction in the Industrial Accident Commission to conduct any hearing or to grant any award.

The Commission does not dispute the fact that the casualty occurred in navigable waters; but it contends that as the business of the employer was a pleasure business, there was not a maritime contract touching rights and duties pertaining to commerce or navigation in a way to invoke the rules of maritime law and exclude the case from the juridical competency of the state tribunals, and that the matter

is one merely of local concern. It is asserted that the application of the state compensation act and the assertion of jurisdiction by the local courts in the instant case will not work any prejudice to the characteristic features of the general maritime law or interfere with the proper harmony or uniformity of that law in its international or interstate relations.

The question involved here was carefully analyzed in the case of State ex rel Cleveland Engineering Construction Co. vs. Duffy, et al., 148 N. E. 572, where the court says: "Un- [fol. 155] der these contracts of employment do the rights and liabilities have a direct relation to navigation? And would the application of the local law (Compensation Act) materially affect any of the rules of the sea and thereby the uniformity which is essential to maritime law? • • • A careful examination of the range of work which the employees of plaintiff performed would seem to disclose nothing that had a direct bearing upon the maritime service, navigation, or maritime commerce, either interstate or foreign."

It is pointed out in the case last cited, that there are two parallel lines of decisions, one line having its basis in the decision of the United States Supreme Court in the Jensen case (Southern Pacific Co. v. Jensen, 244 U. S. 205), the other having its basis in the Rohde case (Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469). The court further says: "A large number of cases may be cited which adopt the principle announced in Southern Pacific Co. v. Jensen, supra, but all that class of cases is founded upon some conflict of the law of the sea or maritime law with the local statute. These cases often relate to stevedores or longshoremen unloading the cargo of vessels or artisans working upon a vessel engaged in interstate or foreign trade, in fact, all of them have some direct bearing upon maritime law. On the other hand, the courts distinctly recognize a group of cases, of which Grand Smith-Porter Ship Co. v. Rohde, supra, is the leading case, all founded upon the principle that their provisions were found not to be in conflict with any essential feature of the general maritime law. Industrial Commission of N. Y. v. Nordenholt Corp. 259 U. S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013, is of

this class; also Western Fuel Co. v. Gascia, Adm'r, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210."

It is true the decisions have made it rather difficult to ascertain the exact dividing line between casualties which are strictly maritime and those which are more properly designated as marine or non-maritime. It would seem that [fols. 156-170] the rigor- Jensen case has been modified by subsequent cases and that the trend of the more recent cases is to permit the state law to operate where the employment has no direct relation to interstate or foreign commerce or navigation, notwithstanding the fact that the casualty occurs in navigable waters.

The application of the compensation act in this case is not in conflict with the provisions of any Federal statute. The action was not brought to recover damages for a tort, but solely for compensation under our statute. We think the case is similar in principle to the cases of City of Oakland v. Industrial Accident Commission, 198 Cal. 273 and Alaska Packers v. Industrial Accident Commission, 73 Cal. Dec. 330. It is, of course, the policy of this court to give force and effect to the Statutes of this state unless they are clearly unconstitutional.

The award of the Industrial Accident Commission is affirmed.

Langdon, J.

We concur: Shenk, J., Waste, C. J., Curtis, J., Seawell, J., Richards, J., Preston, J.

[fol. 171] In Supreme Court of California, in Bank

[Title omitted]

Order Denying Rehearing—April 26, 1928

By the Court:

The petition for a rehearing of this matter (review) is denied. All present concur.

Waste, Chief Justice.

[fol. 172] In Supreme Court of California, Bank

Los Angeles No. 9991

London Guarantee and Accident Company, Ltd.
Petitioner,

vs.

The Industrial Accident Commission of the State of California, Sarah Jane Brooke, and John Arthur Brooke, Respondents

On Review from the Industrial Accident Commission of the State of California

Judgment—March 27, 1928

The above entitled matter having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged, and decreed by the Court that the award of the Industrial Accident Commission of the State of California in the above-entitled cause be, and the same is hereby, affirmed.

Certificate to foregoing paper omitted in printing.

[fol. 173] In Supreme Court of California

[Title omitted]

Petition for Order Allowing Appeal and Writ Thereon, Assignment of Errors, and Prayer for Reversal

Petition for Order Allowing Appeal and Writ Thereon

Petitioner, London Guarantee and Accident Company, Ltd., a corporation duly organized and existing under and by virtue of the Laws of Great Britain with its principal place of business in the United States in the City, County and State of New York and authorized to do and doing a

general insurance business in the State of California with a Branch Office in the City of Los Angeles, State of California, considering itself aggrieved by the decision of the Supreme Court of the State of California in the above entitled cause rendered and decided March 27, 1928 which said decision became final for the purposes of a review thereof by the Supreme Court of the United States by the denial on April 26, 1928 by the Supreme Court of the State of California of the petition for a re-hearing (review) of the said cause theretofore duly and timely filed in said Court by the appellant herein, hereby prays that an order allowing appeal be made and that a writ thereon issue herein directed to the Supreme Court of the State of California, and for an order fixing the amount of the bond thereon and directing that the bond when approved and duly filed shall operate as a supersedeas.

[fol. 174] Assignment of Errors

And the said London Guarantee and Accident Company, Ltd., assigns the following errors in the record and proceedings in the said cause:

1. The Supreme Court of the State of California erred in finding and holding that John James Uttley Brooke was not in the employ of the Morris Pleasure Fishing, Inc. under and pursuant to a maritime contract, on April 8, 1926, at the time of his death by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States).

2. The Supreme Court of the State of California erred in finding and holding that John James Uttley Brooke, while in the service of the Morris Pleasure Fishing, Inc., was not engaged in a maritime employment, on April 8, 1926, at the time of his death by accidental drowning in Santa Monical Bay, California (public navigable waters of the United States).

3. The Supreme Court of the State of California erred in finding and holding that John James Uttley Brooke, while in the service of the Morris Pleasure Fishing, Inc., was not engaged in performing a maritime service under

and pursuant to a maritime contract, on April 8, 1926, at the time of his death by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States).

4. The Supreme Court of the State of California erred in finding and holding that the injury or accident suffered by John James Uttley Brooke, on April 8, 1926, while in the employ of the Morris Pleasure Fishing, Inc., to wit, his death by drowning in the waters of Santa Monica Bay, California (public navigable waters of the United States), was not a maritime injury or accident.

5. The Supreme Court of the State of California erred in finding and holding that the business conducted by the Morris Pleasure Fishing, Inc. and in relation to or in con-
[fol. 175] nection with which John James Uttley Brooke was employed, on April 8, 1926, at the time of his death by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States), was not a maritime business or industry.

6. The Supreme Court of the State of California erred in finding and holding that a statute of the State of California, to wit, Workmen's Compensation, Insurance and Safety Act of 1917 (Chap. 586 Statutes 1917), as amended, the provisions thereof and the remedies thereunder were to be applied by reason of the death, on April 8, 1926, by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) of John James Uttley Brooke, while in the service of the Morris Pleasure Fishing, Inc.

7. The Supreme Court of the State of California erred in finding and holding that all matters arising out of or in relation to the death, on April 8, 1926, of John James Uttley Brooke by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) and while in the service of the Morris Pleasure Fishing, Inc., were not exclusively within the admiralty and maritime jurisdiction of the Courts of the United States pursuant to Section 2 of Article III of the Constitution of the United States of America.

8. The Supreme Court of the State of California erred in finding and holding that the application of a statute of the State of California, to wit, Workmen's Compensation, Insurance and Safety Act of 1917 (Chap. 586 Statutes 1917), as amended, the provisions thereof and the remedies thereunder, to the matters arising out of or in relation to the death, on April 8, 1926, of John James Uttley Brooke by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) and while in the service of the Morris Pleasure Fishing, Inc., did not effect a result contrary to or in violation of the provisions of Section 2 of Article IIII of the Constitution of the United States of America.

[fol. 176] 9. The Supreme Court of the State of California erred in finding and holding that the Industrial Accident Commission of the State of California had jurisdiction to make an award in relation to or by reason of the death, on April 8, 1926, of John James Uttley Brooke by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) and while in the service of the Morris Pleasure Fishing, Inc., such finding and holding being in contravention of Section 2 of Article III of the Constitution of the United States of America.

10. The Supreme Court of the State of California erred in finding and holding that the award made by the Industrial Accident Commission of the State of California in relation to or by reason of the death, on April 8, 1926, of John James Uttley Brooke by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) and while in the service of the Morris Pleasure Fishing, Inc., should be affirmed, and further erred in affirming the same, such finding and holding and such affirmance being in contravention of Section 2 of Article III of the Constitution of the United States of America.

Prayer for Reversal

For which errors the appellant London Guarantee and Accident Company, Ltd., prays that the said judgment or

decision of the Supreme Court of the State of California dated March 27, 1928 in the above entitled cause as rendered final by the denial on April 26, 1928 by the Supreme Court of the State of California of the petition for a rehearing (review) of the said cause theretofore duly and timely filed in said Court by the appellant, be reversed and a judgment or decision rendered in favor of the appellant and for costs.

Leo C. Weiler, Counsel for Appellant. Office & P. O. address: 175 Fifth Avenue, Borough of Manhattan, New York, New York.

[fols. 177-180] In Supreme Court of California

Order Allowing Appeal

Upon considering the foregoing petition for an Order Allowing Appeal and Writ Thereon, Assignment of Errors and Prayer for Reversal, the Order Allowing Appeal therein prayed for is hereby granted and made, the Writ thereon is hereby allowed, the bond is hereby fixed in the sum of One thousand five hundred ($1,500) Dollars and it is ordered that the bond when approved and duly filed shall operate as a supersedeas.

Dated the 7th day of June, 1928.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fols. 181-183½] Citation, in usual form, showing service on T. C. Faulkner, filed June 16, 1928, omitted in printing.

[fol. 184] In Supreme Court of California

[Title omitted]

Stipulation in Lieu of Præcipe and Counter Præcipe

The parties to this appeal by their respective counsel, in lieu of præcipe and counter præcipe, do hereby stipulate as follows:

I. The Clerk of the Supreme Court of the State of California in obedience to the Writ herein, issued upon Order Allowing Appeal, is respectfully requested to transmit to the Supreme Court of the United States as and for the transcript of the record of this cause, a copy of the following indicated portions of the record:

1. Petiton for writ of review verified December 4, 1926, filed in the District Court of Appeal of the State of California, Second Appellate District, Division Two, together with the exhibits there in referred to and thereto annexed, to wit:

Exhibit A—Application for adjustment of claim.
Exhibit B—Order joining parties defendant.
Exhibit C—Answer of defendants.
Exhibit D—Findings and Award.
Exhibit E—Petition of defendants for rehearing.
Exhibit F—Order denying petition for rehearing.

2. Petitioner's memorandum of points and authorities in support of its application for writ of review filed in the District Court of Appeal of the State of California, Second Appellate District, Division Two.

3. Minute Order of the District Court of Appeal of the State of California, Second Appellate District, Division Two dated January 7, 1927 and signed by the Honorable Lewis R. Works, Presiding Justice.

4. Writ of review (certiorari) dated January 8, 1927 and issued out of the District Court of Appeal, Second Appellate District of the State of California, Division Two, directed to the Industrial Accident Commission of the State [fol. 185] of California (returnable January 31, 1927), together with the proof of the service of said writ upon said Industrial Accident Commission of the State of California.

5. Certification of F. B. Lord, Secretary of the Industrial Accident Commission of the State of California, dated January 26, 1927, (certifying the proceedings before the Industrial Accident Commission of the State of California).

6. Application for adjustment of claim dated April 24, 1926 (being a part of the record of proceedings had before

the Industrial Accident Commission of the State of California).

7. Order joining parties defendant, dated May 28, 1926 (being a part of the record of proceedings had before the Industrial Accident Commission of the State of California).

8. Answer of defendants Morris Pleasure Fishing, Inc. and London Guarantee and Accident Company, Ltd. (being a part of the record of proceedings had before the Industrial Accident Commission of the State of California).

9. Report of hearing on the 10th day of June, 1926 at 10:30 o'clock A. M. at the Chamber of Commerce Building, Long Beach, California, before Letus N. Crowell, Referee (L. A. claim #6044), (being a part of the record of proceedings had before the Industrial Accident Commission of the State of California).

10. Report of further hearing on September 13, 1926 at 3:30 o'clock P. M. at 911 Sun Finance Building, Los Angeles, California, before Letus N. Crowell, Referee (L. A. claim #6044), (being a part of the record of proceedings had before the Industrial Accident Commission of the State of California).

11. Certification of F. B. Lord, Secretary of the Industrial Accident Commission of the State of California dated January 27, 1927 (referring to testimony in the case entitled Mrs. Jennie Gregory et als. vs. Captain Morris Fishing Co. and London Guarantee and Accident Company, L. A. #5986 as had on the 13th day of September 1926), (by stipulation a part of the record in this cause before the Industrial Accident Commission of the State of California).

12. Report of hearing on June 10, 1926 at 10:30 o'clock A. M. at the Chamber of Commerce Building, Long Beach, California, before Letus N. Crowell, Referee, in the case of Mrs. Jennie Gregory et als. vs. Morris Pleasure Fishing, Inc. and London Guarantee and Accident Company, Ltd. (Claim L. A. #5986), at which hearing there was taken the testimony of Jennie Gregory and Josephine Morris, (having been returned by the Industrial Accident Commission of the State of California as a part of the record of proceedings in this cause).

13. Report of further hearing on September 13, 1926 at 3:30 o'clock P. M. at 911 Sun Finance Building, Los Angeles, California, before Letus N. Crowell, Referee, in the case of Mrs. Jennie Gregory et als. vs. Morris Pleasure Fishing Co. Inc. and London Guarantee and Accident Company, Ltd., (claim L. A. #5986), (by stipulation a part of the record in this cause), (being a part of the record of proceedings had before the Industrial Accident Commission of the State of California).

14. Findings and Award dated October 6, 1926 (being a a part of the record of proceedings had before the Industrial Accident Commission of the State of California).

[fol. 186] 15. Petition of defendants for rehearing (being part of the record of proceedings had before the Industrial Accident Commission of the State of Califronia).

16. Order denying petition for rehearing, dated November 5, 1926 (being a part of the record of proceedings had before the Industrial Accident Commission of the State of California).

17. Petition for hearing in the Supreme Court of the State of California after final decision by the District Court of Appeal, Second Appellate District, Division Two, together with the exhibit therein referred to and thereto annexed, to wit: The opinion written in the District Court of Appeal, Second Appellate District, Division Two (Civ. 5532) of Johnson, J. (pro tem) concurred in by Works, P. J. and Thompson, J.

18. Order in the Supreme Court of the State of California dated July 25, 1927 (L. A. 9991-2 Civ. 5532) transferring matter to said Court for hearing and decision.

19. Order in Supreme Court of the State of California dated August 11, 1927 (L. A. 9991) setting matter for hearing.

20. In the Supreme Court of the State of California—Citation of additional authorities submitted by Respondent, Industrial Accident Commission.

21. In the Supreme Court of the State of California—Reply brief on behalf of London Guarantee and Accident Company, Ltd.

22. In the Supreme Court of the State of California (in Bank)—Order of Chief Justice dated December 15, 1927 submitting matter as of that date.

23. In the Supreme Court of the State of California—Order dated March 27, 1928 affirming award of the Industrial Accident Commission of the State of California.

24. In the Supreme Court of the State of California—Opinion filed March 27, 1928 (L. A. 9991).

25. In the Supreme Court of the State of California—Petition for rehearing, dated April 14, 1928.

26. In the Supreme Court of the State of California—Answer to Petition for rehearing.

27. In the Supreme Court of the State of California—Order dated April 26, 1928 denying petition for a rehearing (review).

28. In the Supreme Court of the State of California—Remittitur to Industrial Accident Commission of the State of California.

II. In addition thereto, the Clerk of the Supreme Court of the State of California will transmit to the Supreme Court of the United States and as a part of the return, the following:

1. A copy of the petition for order allowing appeal and writ thereon, assignment of errors and prayer for reversal, together with the order at the foot thereof date June 7, 1928 made by the Honorable William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fol. 187] 2. A copy of the bond on appeal, dated June 15, 1928, approved by the Honorable William H. Waste, Chief Justice of the Supreme Court of the State of California.

3. The original citation dated June 15, 1928 signed by the Honorable William H. Waste, Chief Justice of the

Supreme Court of the State of California and directed to the Industrial Accident Commission of the State of California, Sarah Jane Brooke and John Arthur Brooke, bearing at the foot thereof an admission of the service thereof on the 15th day of June 1928.

4. The original writ issued upon order allowing appeal, dated June 15, 1928, signed and sealed by the Clerk of the District Court of the United States, Northern District of California, allowed at the foot thereof by the Honorable William H. Waste, Chief Justice of the Supreme Court of the State of California and directed to the Supreme Court of the State of California.

5. This stipulation in lieu of præcipe and counter præcipe.

6. A certificate under his hand and the seal of the Supreme Court of the State of California, properly certifying and authenticating all of the foregoing, pursuant to statute and rule.

III. The transcript, return and record so prepared and certified, it is agreed will contain in itself all the papers, exhibits, depositions and other proceedings in this cause which are necessary to the hearing of this appeal by the Supreme Court of the United States.

Items 2, 12 and 17, as hereinabove set forth in paragraph I, are included in this Return at the request of Counsel for Appellees herein and Respondents before the Supreme Court of the State of California.

All other portions of the record, as stipulated herein above, are included in this Return at the request of Counsel for Appellant herein, Petitioner before the Supreme Court of the State of California.

Dated, August 22nd, 1928.

Leo C. Weiler, Counsel for Appellant. Office & P. O. address: 175 Fifth Avenue, New York, New York.
G. C. Faulkner, Counsel for Appellees. Office & P. O. address: State Building, Civic Center, San Francisco, California.

[fols. 188-193] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 194-201] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed Oct. 3, 1928

On consideration of the Petition of counsel for the appellant herein, hereto annexed, and good cause therefor having appeared,

It is now here ordered, that the time of the appellant to docket the case and file the record thereof with the Clerk of this Court be further enlarged, and the time of the appellant to so docket this case and file the record thereof be and the same hereby is further extended to and including October 15th, 1928.

Dated September 5th, 1928.

Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

[fol. 202] [File endorsement omitted.]

[fol. 203] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1928

No. 491

STATEMENTS OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Oct. 8, 1928

Affidavit of Service of Appellant's Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed

STATE OF NEW YORK,
County of New York, ss:

Leo C. Weiler, being duly sworn, says:

I am the counsel for appellant herein.

That on the 5th day of October, 1928, I served upon G. C. Faulkner, Esq., the counsel for the appellees herein, copies of the annexed Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed.

That said service of said copies was made as follows:

At Madison Square Station of the United States Post Office, 23rd Street in the Borough of Manhattan, City and State of New York, I duly mailed a copy thereof, securely enclosed in a fully post-paid wrapper, directed to the said G. C. Faulkner, Esq., at his office and post office address, State Building, Civic Center, San Francisco, California, and dispatched to him by ordinary mail.

[fol. 204] At Madison Square Station of the United States Post Office, 23rd Street in the Borough of Manhattan, City and State of New York, I duly mailed a copy thereof, securely enclosed in a fully post-paid wrapper, directed to the said G. C. Faulkner, Esq., at his office and post office address, State Building, Civic Center, San Francisco, California, and dispatched to him by air mail.

At Madison Square Station of the United States Post Office, 23rd Street, in the Borough of Manhattan, City and State of New York, I duly mailed a copy thereof, securely enclosed in a fully post-paid wrapper, directed to the said G. C. Faulkner, Esq., at his office and post office address, State Building, Civic Center, San Francisco, California, and dispatched to him by United States Registered Mail, receiving therefor the official receipt No. 330,967.

I know the said G. C. Faulkner, Esq., the person so served as aforesaid, to be the counsel for the appellees herein, and the said address, to which the same were respectively dispatched as aforesaid, to be the office and post office address of said counsel for appellees.

Leo C. Weiler.

Sworn to before me this 5th day of October, 1928. Florence Epstein. Florence Epstein, Notary Public, Kings County. Kings Co. Clerk's No. 126, Reg. No. 9028. N. Y. Co. Clerk's No. 71, Reg. No. 9086. My Commission Expires March 30, 1929. Certificate filed in N. Y. Co. (Seal Florence Epstein, Notary Public, Kings County.)

[fol. 205] Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed

Comes now the Appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. The Supreme Court of the State of California erred in finding and holding that John James Uttley Brooke was not in the employ of the Morris Pleasure Fishing, Inc. under and pursuant to a maritime contract, on April 8, 1926, at the time of his death by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States).

Point 2. The Supreme Court of the State of California erred in finding and holding that John James Uttley Brooke, while in the service of the Morris Pleasure Fishing, Inc., was not engaged in a maritime employment, on April 8, 1926, at the time of his death by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States).

Point 3. The Supreme Court of the State of California erred in finding and holding that John James Uttley Brooke, while in the service of the Morris Pleasure Fishing, Inc., was not engaged in performing a maritime service under and pursuant to a maritime contract, on April 8, 1926, at the time of his death by accidental drowning in [fol. 206] Santa Monica Bay, California (public navigable waters of the United States).

Point 4. The Supreme Court of the State of California erred in finding and holding that the injury or accident suffered by John James Uttley Brooke, on April 8, 1926, while in the employ of the Morris Pleasure Fishing, Inc., to wit, his death by drowning in the waters of Santa Monica Bay, California (public navigable waters of the United States), was not a maritime injury or accident.

Point 5. The Supreme Court of the State of California erred in finding and holding that the business conducted by the Morris Pleasure Fishing, Inc., and in relation to or in connection with which John James Uttley Brooke was employed, on April 8, 1926, at the time of his death by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States), was not a maritime business or industry.

Point 6. The Supreme Court of the State of California erred in finding and holding that a statute of the State of California, to wit, Workmen's Compensation, Insurance and Safety Act of 1917 (Chap. 586 Statutes 1917), as amended, the provisions thereof and the remedies thereunder were to be applied by reason of the death, on April 8, 1926, by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) of John James Uttley Brooke while in the service of the Morris Pleasure Fishing, Inc.

Point 7. The Supreme Court of the State of California erred in finding and holding that all matters arising out of or in relation to the death, on April 8, 1926 of John James Uttley Brooke by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) and while in the service of the Morris Pleasure Fishing, Inc., were not exclusive within the admiralty and maritime jurisdiction of the Courts of the [fol. 207] United States pursuant to Section 2 of Article III of the Constitution of the United States of America.

Point 8. The Supreme Court of the State of California erred in finding and holding that the application of a statute of the State of California, to wit, Workmen's Compensation, Insurance and Safety Act of 1917 (Chap. 586 Statutes 1917), as amended, the provisions thereof and the remedies thereunder, to the matters arising out of or in relation to the death, on April 8, 1926, of John James Uttley Brooke by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) and while in the service of the Morris Pleasure Fishing, Inc., did not effect a result contrary to or in violation of the provisions of Section 2 of Article III of the Constitution of the United States of America.

Point 9. The Supreme Court of the State of California erred in finding and holding that the Industrial Accidental Commission of the State of California had jurisdiction to make an award in relation to or by reason of the death, on April 8, 1926, of John James Uttley Brooke by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) and while in the service of the Morris Pleasure Fishing, Inc., such finding and

holding being in contravention of Section 2 of Article III of the Constitution of the United States of America.

Point 10. The Supreme Court of the State of California erred in finding and holding that the award made by the Industrial Accident Commission of the State of California in relation to or by reason of the death, on April 8, 1926, of John James Uttley Brooke by accidental drowning in Santa Monica Bay, California (public navigable waters of the United States) and while in the service of the Morris [fol. 208] Pleasure Fishing, Inc., should be affirmed, and further erred in affirming the same, such finding and holding and such affirmance being in contravention of Section 2 of Article III of the Constitution of the United States of America.

And the Appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

Title of paper	Record page
Petition for writ of review	1 to 9 inclusive
Order joining parties defendant (Exhibit B to foregoing)	12
Minute order of District Court of Appeal—January 7, 1927	31
Writ of review (certiorari)	32
Certification	33
Application for adjustment of claim	34 to 35 inclusive
Answer	36 to 37 inclusive
Report of hearing	38
Report of further hearing	39 to 59 inclusive
Certification	60
Report of hearing	61 to 72 inclusive
Report of further hearing	73 to 82 inclusive
Findings and award	83 to 84 inclusive
Petition of defendants for rehearing	85 to 90 inclusive
Order denying petition for rehearing	91
Petition for hearing in Supreme Court after final decision by District Court of Appeal	92 to 124 inclusive
Opinion in District Court of Appeal (being exhibit referred to in and attached to foregoing)	125 to 142 inclusive

Title of paper	Record page
Order in Supreme Court of California —July 25, 1927	143
Order in Supreme Court of California —August 11, 1927	144
[fols. 209 & 210] Order in Supreme Court of California—December 15, 1927	150
Minute order in Supreme Court of California—March 27, 1928	151
Opinion, Supreme Court of California filed March 27, 1928	152 to 156 inclusive
Order in Supreme Court of California denying petition for rehearing	171
Remittitur	172
Petition for order allowing appeal, assignment of errors and prayer for reversal, with order at the foot thereof dated June 7th, 1928 allowing appeal	173 to 177 inclusive
Citation with admission of service	181
Stipulation in lieu of praecipe and counter-praecipe	184 to 187 inclusive
Certification	188

Leo C. Weiler, Leo C. Weiler, Counsel for Appellant. Office & P. O. address 175 Fifth Avenue, Borough of Manhattan, New York, N. Y.

[fol. 211] [File endorsement omitted.]

Endorsed on cover: File No. 33,800. California Supreme Court. Term No. 491. London Guarantee and Accident Company, Ltd., Appellant, vs. Industrial Accident Commission of the State of California, Sarah Jane Brooke, and John Arthur Brooke. Filed October 4th, 1928. File No. 33,800.